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Title: T. H. Bell, Secretary of Education, Petitioner
v.
New Jersey

Docketed:
June 15, 1984

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Burgess, Mary Ann

Entry	Date	Note	Proceedings and Orders
1	May 2 1984		Application for extension of time to file petition and order granting same until June 16, 1984 (Brennan, May 1984).
2	Jun 15 1984	G	Petition for writ of certiorari filed.
4	Jul 6 1984		Order extending time to file response to petition until August 17, 1984.
5	Jul 16 1984		Brief amicus curiae of Lawyers' Comm. for Civil Rights Under Law filed.
6	Aug 17 1984		Brief of respondent New Jersey in opposition filed.
7	Aug 22 1984		DISTRIBUTED. September 24, 1984
9	Sep 21 1984		Reply brief of petitioner Bell, Sec. of Ed. filed.
10	Oct 1 1984		Petition GRANTED.
			**********
11	Nov 15 1984		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed. VIDED.
12	Nov 15 1984		Brief of petitioner Bell, Sec. of Ed. filed.
13	Nov 23 1984		Joint appendix filed.
14	Dec 4 1984		SET FOR ARGUMENT. Tuesday, January 8, 1985. (4th case)
15	Dec 6 1984		CIRCULATED.
16	Dec 24 1984	X	Brief of respondent New Jersey filed.
17	Dec 31 1984	X	Reply brief of petitioner Bell, Sec. of Ed. filed.
18	Jan 2 1985		Record filed.
19	Dec 24 1984		Record filed.
20	Jan 2 1985		Record filed.
21	Dec 24 1984		Record filed.
22	Jan 8 1985		ARGUED.

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83-2064
No. --

In the Supreme Court of the United States

OCTOBER TERM, 1983

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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86 pp

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QUESTION PRESENTED

Whether subsequent amendments in substantive requirements of federal grants should be applied retroactively to audits of previously expended grant funds in the absence of any legislative direction to that effect.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of T. H. Bell, Secretary of Education, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 1a-5a) is reported at 724 F.2d 34. The prior opinion of the court of appeals (App. *infra*, 6a-31a) is reported at 662 F.2d 208. The decision of the Education Appeal Board (App. *infra*, 32a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. *infra*, 60a-61a) was entered on December 27, 1983, and a petition for rehearing was denied on February 17, 1984 (App. *infra*, 62a). On May 3, 1984, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

20 U.S.C. (1976 ed.) 241e(a) provided in pertinent part:

> A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—
>
> (1) that payments under this subchapter will be used for * ** programs and projects * * * (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families * * *.

20 U.S.C. 2732(a)(1) provides in pertinent part:

> [A] local educational agency shall use funds received under this subchapter in school attendance areas having high concentrations of children from low-income families (hereinafter referred to as "eligible school attendance areas") * * *. A local educational agency may designate any school attendance area in which at least 25 per centum of the children are from low-income families as an eligible school attendance area if the aggregate amount expended under this subschapter and under a State program meeting the requirements of section 2751(c) of this title in that fiscal year in each school attendance area of that agency in which projects assisted under this subchapter were carried out in the preceding fiscal year equals or exceeds the amount expended from those sources in that area in such preceding fiscal year.

45 C.F.R. 116.17(d) (1972) provided in pertinent part:

> A school attendance area for either a public elementary or a public secondary school may be designated as a project area if the estimated percentage of children from low-income families residing in that attendance area is as high as the percentage of such children residing in the whole of the school district, or if the estimated number of children from low-income families residing in that attendance area is as large as the average number of such children residing in the several school attendance areas in the school district.

STATEMENT

The statutory and factual background of this case is summarized in *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 1-3. In brief, federal auditors determined that respondent misused funds it had received as grants in 1970-1972 under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. (1976 ed.) 241a *et seq.*, to improve the educational opportunities available to disadvantaged children.[1] The funds were provided to finance programs "which contribute particularly to meeting the special educational needs of educationally deprived children" in areas with high concentrations of children from low-income families (20 U.S.C. (1976 ed.) 241a). The Secretary's implementing regulations established that a school attendance area met the statutory eligibility requirement if the percentage of low-income children in the area was at least as high as the percentage of such children in the entire school district (45 C.F.R. 116.17(d) (1972)). Respondent gave its assurances, as a condition of its receipt of the grant funds, that the funds would be spent only for programs and projects that satisfied all the applicable Title I requirements (20 U.S.C. (1976 ed.)

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[1] As the Court explained (slip op. 1-2): "Local educational agencies obtain federal [Title I] grants through state educational agencies, which in turn obtain grants from the Department of Education upon providing assurances to the Secretary that the local educational agencies will spend the funds only on qualifying programs. § 182(a), 20 U.S.C. § 2734 (1976 ed. Supp. V)" (footnotes omitted).

241f(a)(1)). The federal audit revealed that, despite these assurances, more than $1 million of Title I funds had been expended in school attendance areas in Newark between September 1, 1970 and September 1, 1972, where the percentages of low-income children were below the district-wide percentage of such children, in clear violation of 45 C.F.R. 116.17(d) (1972).

After administrative review of these audit findings, the Education Appeal Board concluded that the Title I funds had been used in ineligible school attendance areas in Newark, and directed New Jersey to repay $1,031,304 to the Department of Education (App., *infra*, 57a-58a). The Secretary declined to review the Appeal Board's decision, which accordingly became final (*id.* at 15a).

Respondent thereupon petitioned for judicial review, challenging both the Secretary's jurisdiction to require recoupment and the validity of the administrative determination that the funds had been misspent. The court of appeals agreed with respondent's jurisdictional argument and therefore did not consider the alternative claim (App., *infra*, 8a). This Court reversed, "conclud[ing] that the Secretary has followed the proper procedures. He has administratively determined the amount of the debt owed by [respondent] to the Federal Government * * * as he is empowered to do" (slip op. 18-19). The Court remanded the case to the court of appeals for consideration of the State's objections to the merits of the Secretary's determination (*id.* at 19).

On remand, the court of appeals again refused to require the repayment of the funds in issue. For the first time,[2] respondent argued that its compliance with the

[2] Although the court of appeals acknowledged that appellate courts do not generally consider issues that have not been passed on by the agency or court whose decision is under review, it concluded that an exception to this rule was appropriate here because it believed the issue to be one "of national importance, which is singularly within the competence of appellate courts and is not predicated on complex factual determinations" (App., *infra*, 3a-4a n.1).

conditions attached to its Title I grant should be tested by the standards contained in the 1978 Amendments to the ESEA, rather than by the standards that were in effect when the funds were awarded and expended. The amended standards permitted the use of Title I funds in any school attendance area "in which at least 25 per centum of the children are from low-income families * * * if the aggregate amount expended under [Title I] and under a [qualifying] State program * * * in that fiscal year in each school attendance area of that agency in which [Title I] projects * * * were carried out in the preceding fiscal year equals or exceeds the amount expended from those sources in that area in [the] preceding fiscal year" (20 U.S.C. 2732(a)(1)). Respondent asserted that, if tested by this more lenient standard, most of the 1970-1972 Newark expenditures were allowable.

The court of appeals agreed that the eligibility standards contained in the 1978 Amendments should be applied to the 1970-1972 grant fund expenditures, on the theory that "[a] federal court or administrative agency must 'apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary'" (App., *infra*, 4a, quoting *Bradley* v. *School Board*, 416 U.S. 696, 711 (1974)). Finding no such manifest injustice or contrary statutory indication, the court concluded that retroactive application of the 1978 standards was appropriate, particularly because those amendments were assertedly "remedial," and the case "involves a public matter of great national concern [rather than] the routine private lawsuit in which a retrospective application of a law would disadvantage a private party who had relied on a settled body of pri-

vate law" (App., *infra*, 4a-5a). The court accordingly remanded the case to the Secretary to determine, for each school attendance area that had a Title I project in the relevant years, whether the 1970-1972 expenditures conformed to the 1978 standards.

REASONS FOR GRANTING THE PETITION

Last Term, this Court in this case "established the right of the Federal Government to recover funds misused by the States" when they receive Title I grants. *Bell* v. *New Jersey*, slip op. 17. The decision of the court of appeals on remand, denying such recovery when subsequent legislation has modified the standard with which a state failed to comply, substantially eviscerates the Secretary's right to recover misspent funds and seriously jeopardizes the federal government's ability adequately to monitor grants-in-aid for compliance with statutory and regulatory requirements. Moreover, the decision below is inconsistent with the decisions of other courts of appeals and with basic principles of statutory interpretation and federal grant law, and misreads both the congressional intent in enacting the 1978 Amendments and the decision of this Court in *Bradley* v. *School Board*, *supra*. Review by this Court is plainly warranted.

1. In *Bell* v. *New Jersey*, *supra*, this Court unanimously held that the federal government may recover misused funds "advanced as part of a federal grant-in-aid-program under Title I of the Elementary and Secondary Education Act" (slip op. 1). The Court emphasized that states are required "to honor the obligations voluntarily assumed as a condition of federal funding" (slip op. 16) and that when a state "fail[s] to fulfill those assurances, * * * [it becomes] liable for the funds misused, as the grant specified" (slip op. 17).[3]

[3] The Court did not find it necessary at that stage of the case to address directly the question presented here—whether the substantive provisions of the 1978 Amendments apply retroactively (slip op. 3 n.3). It did, however, retroactively apply the provisions of the 1978 Amendments that merely changed the forum for review from the Title I Audit Hearing Board to the Education Appeal Board, noting that "[a]s Justice Holmes explained for the Court in *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916), a change of forum 'takes away no substantive right' and thus can apply retroactively" (*Bell* v. *New Jersey*, slip op. 4 n.3). In contrast, the retroactive application of the revised standards now at issue deprives the Secretary of the substantive right to recoup misspent grant funds.

The court of appeals nevertheless concluded that respondent can avoid such liability, even though it failed to fulfill an assurance made when the funds were received and expended, if it can show that *subsequent* grants did not require the giving of that assurance. This conclusion cannot be reconciled with the approach of other courts of appeals, which have consistently analyzed the terms of the statutes and regulations in effect when the expenditures were made to determine whether the expenditures were proper. See, *e.g.*, *Indiana* v. *Bell*, 728 F.2d 938, 941 n.6 (7th Cir. 1984); *Kentucky* v. *Secretary of Education*, 717 F.2d 943, 945, 947 n.9 (6th Cir. 1983), petition for cert. pending, No. 83-1798; *West Virginia* v. *Secretary of Education*, 667 F.2d 417, 420 (4th Cir. 1981). Cf. *Woods* v. *United States*, 724 F.2d 1444, 1446 n.1 (9th Cir. 1984) (Food Stamp Program); *North Carolina Comm'n of Indian Affairs* v. *Dep't of Labor*, 725 F.2d 238, 239 (4th Cir. 1984) (CETA Program).

These decisions, unlike the one below, conform to the basic principle that a grantee, in exchange for federal funds, agrees to comply with specific terms and conditions relating to the use of those funds. See, *e.g.*, *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981); *King* v. *Smith*, 392 U.S. 309 (1968). As Justice White stated in his concurring opinion in this

Court's prior decision in this case, *Bell* v. *New Jersey*, No. 81-2125, slip op. 2:

> The States entered into contractual-type agreements with the United States to disburse the [Title I] monies in accordance with specified conditions. The States had no legitimate claim to a right to be able to breach these conditions with impunity. In the absence of any contrary congressional intent, agreements such as these are surely enforceable.

The "specified conditions" agreed to by respondent in exchange for Title I funds during 1970-1972 were the statute and regulations then in effect, not statutory changes enacted more than six years after the grant funds were expended.

2.a. The court of appeals erred in ignoring the basic and longstanding rule of statutory construction that substantive legislation must apply prospectively, unless there is a clear legislative intent to the contrary. *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Greene* v. *United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164 (1944); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928) ("Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears." (citing cases)); *Cameron* v. *United States*, 231 U.S. 710, 720 (1914) ("In the absence of a clearly expressed legislative intent to the contrary the court will presume that the law-making power is acting for the future and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force."); *United States* v. *Heth*, 7 U.S. (3 Cranch) 339, 413 (1806); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775

(1936). As this Court stated in *Union Pacific R. R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913):

> [T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. * * * [A] retrospective operation will not be given to a statute which interferes with antecedent rights * * * unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

The new eligibility requirements enacted as part of the 1978 Amendments were clearly substantive legislation, relating to the standards and conditions under which school districts accepted and used Title I grant funds. Nothing in either the requirements themselves or their legislative history even suggests, much less unequivocally requires, that they are to be applied retroactively.

Indeed, Congress's intent to apply 20 U.S.C. 2732(a)(1) prospectively is apparent both from the terms of the statute and from its legislative history. The statute specifies that October 1, 1978, is its effective date (Pub. L. No. 95-561, § 1530, 92 Stat. 2380)—a strong indication that it is to be applied only to grants made after that date. That reading is reinforced by 20 U.S.C. 2702, which also indicates a prospective period of applicability for the new substantive Title I requirements:

> During the period beginning October 1, 1978, and ending September 30, 1983, the Secretary shall, in accordance with the provisions of this subchapter, make payments to State educational agencies for grants made on the basis of entitlements created under this subchapter.

The legislative history supports this language. The House Report states that the changed requirements clarify "the manner in which school districts *are to distribute* Title I funds among eligible schools and children," thus confirming that the changes apply only to

future grants. H. R. Rep. 95-1137, 95th Cong., 2d Sess. 21 (1978) (emphasis added).

The court of appeals erroneously found a contrary legislative intent in statements in the hearings that the 1978 Amendments were designed to correct a perceived "injustice * * * [to] areas with high concentrations of low income families" (App., *infra*, 4a (footnote omitted)). But the statements to which the court referred (*id.* at 4a n.2) contain no mention of the change at issue here in the eligibility requirements for school attendance areas. In any event, although the House and Senate Reports refer generally to a congressional intent to "clarify" existing Title I requirements (H.R. Rep. 95-1137, 95th Cong., 2d Sess. 22 (1978); S. Rep. 95-856, 95th Cong., 2d Sess. 130 (1978)), such references hardly show that the amendments were intended to affect grants that had previously been made. See *LTV Federal Credit Union* v. *UMIC Government Securities*, 704 F.2d 199, 202 (5th Cir. 1983); *Sikora* v. *American Can Co.*, 622 F.2d 1116, 1121 (3d Cir. 1980). The court of appeals cited no evidence demonstrating "the manifest intention of the legislature" to "interfere[ ] with antecedent rights" (*Union Pacific R.R.* v. *Laramie Stock Yards Co.*, *supra*).[4]

Any possible doubt concerning the legislative intent in this regard is laid to rest by 1 U.S.C. 109, the general savings statute, which provides that "[t]he repeal

[4] We note that, in 1981, the Senate considered an amendment to an appropriations bill that would have relieved the states of any obligation to repay Title I funds that had been misspent before 1978. Although the amendment was ultimately defeated on a point of order (127 Cong. Rec. S5429 (daily ed. May 21, 1981)), nothing in the debate concerning the desirability of forgiving the accrued liabilities of the states remotely suggests that those liabilities—which were calculated on the basis of the standards prevailing at the time of the expenditures—had been altered in any way by the 1978 "clarification" of those standards.

of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall expressly so provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such * ** liability." This statute applies to amendments, as well as outright repeals. *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974); *United States* v. *Mechem*, 509 F.2d 1193, 1194 n.3 (10th Cir. 1975). Moreover, "the term 'liability' as used in the general savings statute has been broadly construed by the courts to comprehend all obligations arising out of any breach of a statutory duty." *NLRB* v. *National Garment Co.*, 166 F.2d 233, 237 & n.4 (8th Cir. 1948) (citing cases); accord, *Hertz* v. *Woodman*, 218 U.S. 205, 217-218 (1910). See also *United States* v. *Carter*, 171 F.2d 530 (5th Cir. 1948) (applying statute to require restitution of overcharges to purchasers of housing under expired statute). There is certainly nothing in the 1978 Amendments that expressly prohibits the continuing applicability of the substantive standards under which the 1970-1972 grants were made; the general savings statute thus provides that the obligations the states voluntarily undertook concerning the ways in which those grants would be expended remain enforceable.

b. *Bradley* v. *School Board*, 416 U.S. 696 (1974), upon which the court of appeals relied (App, *infra*, 4a), does not support the retroactive application of the substantive eligibility standards in the 1978 Amendments to grants made and expended when earlier statutory provisions were in effect. In *Bradley*, this Court stated (416 U.S. at 711) that an appellate court should generally apply the law in effect at the time it renders its decision unless to do so would work a manifest injustice or would be inconsistent with the legislative intent. As we have shown, there is such inconsistency here. Further-

more, application of the substantive eligibility requirements of the 1978 Amendments to these claims would be manifestly unjust.

Indeed, the *Bradley* principle has only been followed in civil cases where application of the law in effect at the time of a court's decision would not alter material substantive rights or affect liability for prelitigation conduct. Thus, it has been followed in retroactively applying new statutes concerning remedies or procedures for matters such as attorney's fees (*Bradley* v. *School Board*, *supra*; *Hutto* v. *Finney*, 437 U.S. 678 (1978)), injunctive relief for future violations (*Cort* v. *Ash*, 422 U.S. 66 (1975)), and jury instructions where the changed law "did not extinguish a cause of action" (*Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981)). But the Court has consistently refused to apply the *Bradley* principle in circumstances that affect a party's substantive rights. See, *e.g.*, *United States* v. *Security Industrial Bank*, *supra*; *Employees* v. *Missouri Pub. Health Dep't*, 411 U.S. 279 (1973); see also *Bradley*, 416 U.S. at 720 ("The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."); *Hutto* v. *Finney*, 437 U.S. at 695.

The court of appeals believed that the "presumption of retroactivity is particularly strong" because the 1978 Amendments were allegedly "remedial" (App., *infra*, 4a). It is frequently stated that remedial statutes are to be applied to cases pending at the time of enactment. See, *e.g.*, *Koger* v. *Ball*, 497 F.2d 702, 705-706 (4th Cir. 1974); *Silverlight* v. *Huggins*, 488 F.2d 107, 109 (3d Cir. 1973); *Connett* v. *Jerseyville*, 96 F.2d 392, 400 (7th Cir. 1938); cf. *Funkhouser* v. *Preston Co.*, 290 U.S. 163, 167-168 (1933). For purposes of retroactivity analysis, however, a remedial statute is one that neither enlarges nor impairs substantive rights, but rather

relates to the means and procedures for enforcing those rights. *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Winfree* v. *Northern Pac. Ry.*, 227 U.S. 296, 301-302 (1913).[5]

The court of appeals also found it significant that "the case * * * involves a public matter of great national concern and is argued on direct appeal by two public agencies. This is not the routine private lawsuit in which a retrospective application of a law would disadvantage a private party who had relied on a settled body of private law. *See Bradley*, *supra*, 416 U.S. at 716-721" (App., *infra*, 5a). In this regard as well, the court below misinterpreted *Bradley*. That case does not suggest that retroactivity analysis should overlook unfairness to public entities, even when a case involves a matter of great national concern. Instead, the Court in *Bradley* emphasized the disparity in the resources available to the litigants there: the "publicly funded" School Board and the "class of children whose constitutional right to a nondiscriminatory education" was directly served by the litigation (416 U.S. at 718). In that context, the Court noted that the great national concern of furthering such education would be enhanced by a full award of attorney's fees. But the Court also emphasized (416 U.S. at 720) that such an award was not unfair to the School Board, which from the outset of the litigation had had a constitutional obligation to provide a nondiscriminatory education and also knew that it

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[5] *Tcherpnin* v. *Knight*, 389 U.S. 332 (1967), the only case cited by the court of appeals, has nothing to do with retroactivity. There, the Court held that the Securities Exchange Act of 1934 was "remedial" in the sense that it provided a new substantive remedy for previously inadequately protected interests, and that it therefore should be interpreted broadly to effectuate that remedial purpose. The Court certainly did not suggest that, because the Act was remedial, it should apply to conduct occurring before the Act was passed.

faced the possibility that it would be required to pay attorney's fees (416 U.S. at 721).

In contrast, here there is no such striking disparity in the resources available to the litigating parties, and no national concern that would be even indirectly served by denying recoupment of misspent grant funds. See *Bell* v. *New Jersey*, slip op. 9 n.8.[6] Instead, the issues presented by this case, "even though raised by a state, are closely akin to private wrongs" (*Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 136-137 (1947)). Furthermore, there was certainly no abrogation of responsibilities by the Secretary with knowledge of the possible consequences. The final determination letter, demanding the repayment of misspent Title I funds, was sent on June 11, 1976, well before enactment of the 1978 Amendments (App., *infra*, 32a).

In fact, the *Bradley* analysis suggests that retroactive application of the substantive provisions of the 1978 Amendments would be inappropriate in this context, because denying retroactivity will further the policies of the ESEA by permitting effective audits and thus by encouraging grantees to conform to their voluntarily accepted obligations. On the other hand, the retroactive application adopted by the court below will seriously complicate agency efforts to audit state compliance with grant conditions and to correct deficiencies identified in that process, particularly in programs where close congressional oversight results in frequent statutory changes in the conditions under which grants are made.

An audit necessarily assumes that the standards to be applied are fixed—otherwise, there is simply no way to determine whether certain expenditures were proper. If those standards change during the course of administrative or judicial review after the audit is completed, the information needed to determine whether the expenditures complied with the new standards may simply not be available, even if a new audit is conducted. For example, here the court of appeals directed the Secretary to determine whether respondent satisfied the requirements of the 1978 Act for each school attendance area that received Title I funds in the relevant years, but there is no assurance that the records necessary to make that determination for 1970-1972 are still available, or indeed were even collected.[7] And, of course, where, as in the ESEA, the statute is regularly amended, the process can go on indefinitely. Although the court of appeals directed the Secretary to apply the 1978 standards, by the time the decision issued the 1981 Act had once again altered the relevant standards. See Pub. L. No. 97-35, 95 Stat. 464, 20 U.S.C. 3801 *et seq*. The need for finality thus argues strongly against the result below.

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[6] Significantly, the reference in *Bradley* to "great national concerns" (416 U.S. at 719) derived from Chief Justice Marshall's language in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), in which the Court applied the peace treaty with France to require the return of a ship seized during the war. There, the Court explained that "in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import * * *." There is, of course, no remotely similar national concern at issue here. Instead, as in *Sikora* v. *American Can Co.*, 622 F.2d 1116, 1122 (3d Cir. 1980), "resolution of this case [will] not cause repercussions in the international community, nor [will] it implicate long standing constitutional violations as in *Bradley*."

[7] Under regulations in effect at the time involved in this case, Title I expenditure records were not required to be maintained beyond five years unless they were involved in an audit; there was no requirement that a state keep expenditure records of the kind necessary for a determination of compliance with the new standard (20 U.S.C. 2732(a)(1)). 45 C.F.R. 116.54 (1972). Accord, 34 C.F.R. 200.56 (Chapter 1 recordkeeping requirement).

3. The financial impact of the court of appeals' decision is difficult to quantify, but it will surely be substantial. Because both the Education Amendments of 1978 and the successor program, Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*), generally were designed to simplify grant procedures and to relax many of the standards with which the states must comply as a condition of eligibility for federal funds, the principle of retroactivity espoused by the court below has a potentially broad applicability to audits under the earlier statutes, as well as to audits under the 1978 Amendments. Thus, defenses based on the decision below can be expected in a substantial number of pending cases, in which approximately $68 million in Title I audit claims are in dispute.

Nor is the impact of this erroneous decision limited to the Title I program. As we noted in our petition (at 17-18), in *Bell* v. *Kentucky*, petition for cert. pending, No. 83-1798, the Office of Management and Budget has informed us that a survey of a sample of the major federal granting agencies, responsible for approximately 38% of the total Fiscal Year 1983 grants, shows that there are currently some $830 million in audit exceptions outstanding. It is not unusual for statutory or regulatory standards to be changed between the time that grant funds are spent and the demand for repayment is made at the conclusion of the audit process. If those changes impose conditions on grant recipients that are more stringent—or simply different—than those to which they agreed to conform when they received and expended the funds, it is clear that the failure to comply with the subsequent conditions, no matter how desirable or "remedial" they may be as a matter of policy, is no ground for demanding the repayment of funds that were properly expended under the conditions applicable at the time the expenditures were made. Cf. *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. at 24. The result should be the same when the subsequent conditions are less, rather than more, stringent: the propriety of the expenditures still should be judged by the standards in effect when they were made, not by those subsequently enacted for later grants.

In sum, the decision of the court of appeals clouds the standards to be applied in auditing compliance with billions of dollars in federal grants-in-aid. This uncertainty will seriously complicate the audit process itself, and the resolution of any disputes that arise out of that process. Like the related decision in *Bell* v. *Kentucky*, No. 83-1798, the decision below thus creates a problem that, in the absence of a definitive correction by this Court, can be expected to recur with some frequency and to exacerbate federal-state relations whenever it does so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1991

STATE OF NEW JERSEY, DEPT. OF EDUCATION,
PETITIONER

v.

SHIRLEY HUFSTEDLER, SECRETARY
OF EDUCATION, ETC.,
RESPONDENT

Petition for Review of Decisions of the
United States Department of Education
On Remand From the Supreme Court
of the United States

Argued October 26, 1983

Before: ADAMS, HUNTER, and HIGGINBOTHAM,
Circuit Judges

(Filed December 27, 1983)

OPINION OF THE COURT

ADAMS, *Circuit Judge*

The State of New Jersey asks us to review a final decision of the Secretary of Education that New Jersey refund over $1 million granted by the federal government under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. § 241a *et seq.* (1976). These funds have been allocated to local educational agencies under State supervision to meet the

special needs of "educationally deprived" children in areas with high concentrations of children from low-income families. *Id.* at § 241a. The dispute between the State and the Secretary has been explained in considerable detail in *New Jersey* v. *Hufstedler*, 662 F.2d 208 (3d Cir. 1981), where this Court held that the Secretary did not have the authority to recover Title I funds allocated before the Education Amendments of 1978, which specifically authorize the recovery of misspent funds.

In *Bell* v. *New Jersey and Pennsylvania*, 103 S.Ct. 2187 (1983), the Supreme Court reversed the decision in *New Jersey* v. *Hufstedler*, *supra*, and remanded the case to this Court so that we might "review the challenges raised by [the] State" and determine whether the Secretary's decision "is supported by substantial evidence and by the application of proper legal standards. . . ." *Id.* at 2198. Having decided only that states can be held liable for the misuse of funds under the Education Act, the Supreme Court left it to us to determine, at least in the first instance, whether the substantive standards of the 1978 amendments apply to grants approved under earlier standards. *Id.* at 2192 n.6. We hold that the later standards do apply and remand the case to the Secretary for specified factual determinations.

I

When an auditor's report first questioned Newark's allocation of Title I grants to various "school attendance areas," the statutory standard for disbursing such funds provided that Title I payments be used for projects "designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families." 20 U.S.C. § 241e(a)(1) (1976). This broad standard was interpreted as covering (1) attendance areas in which the number of children from low-income families was as large as, or larger than, the av-

erage number of such children in the various attendance areas of the school district and (2) attendance areas in which the percentage of such children was as large as, or larger than, the percentage in the school district. 45 C.F.R. § 116.17(d) (1972). In determining the Title I eligibility of its attendance areas in 1970-72, Newark used a method of calculating ratios and percentages that arguably overstated the relative size of the class of students from low-income families.

Throughout this litigation, New Jersey has maintained that the regulations implementing ESEA defeat the legislative goal of meeting the special needs of the educationally deprived. Attendance areas with concentrations of children from low-income families as high as thirty percent have been declared ineligible for Title I aid, simply because they are situated in school districts with even higher levels of poverty. To remedy such inequities, Congress passed a series of amendments to ESEA in 1978 that, under certain circumstances, permit local educational agencies to declare a school attendance area eligible for Title I funds if at least twenty five percent of the children in that area come from low-income families. 20 U.S.C. § 2732(a)(1) (Supp. V. 1981). New Jersey requests that we measure the eligibility of Newark's school attendance areas to receive Title I funding according to this newer standard.[1]

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[1] New Jersey raises this argument for the first time in its brief upon remand. Generally, federal appellate courts do not consider issues that have not been passed on by the agency or district court whose action is being reviewed. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). This is a rule of discretion, rather than jurisdiction, however, and our practice has been to hear issues not raised in earlier proceedings when special circumstances warrant an exception to the general rule. *See e.g.*, *Selected Risk Ins. Co.* v. *Bruno*, 718 F.2d 67 (3d Cir. 1983); *Abrams* v. *U.S. Dept. of Navy*, 714 F.2d 1219 (3d Cir. 1983). Since New Jersey raises an issue of national importance, which is singularly within the competence of appellate courts and is

II

A federal court or administrative agency must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 711 (1964). There is little to suggest that such an application would result in manifest injustice here, and nothing in the 1978 amendments or the legislative history indicates that the amendments were not intended to be applied retroactively. The legislative record is replete with evidence that Congress enacted these amendments to correct the injustice that the earlier eligibility standards worked on areas with high concentrations of low income families.[2] In the proceeding before us, for example, three Newark attendance areas with a "low income percentage" of over 25 percent and seven with a percentage over 30 percent were declared ineligible for Title I aid because the district-wide percentage of children from low-income families was 33.9 percent.

Two considerations inform our judgment that the retroactive application of the new eligibility standards is appropriate. First, the 1978 amendments to the ESEA were designed to correct regulations that frustrated the basic objectives of the Title I program. Since this legislation is remedial, the presumption of retroactivity is particularly strong. *See Tcherepnin* v. *Knight*, 389

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not predicated on complex factual determinations, we will consider the State's argument as to the retroactivity of the 1978 ESEA amendments.

[2] Elementary and Secondary Education: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, Part 16, Services and Student Development; Part 18: Administration of Title I of ESEA; Part 19: Title I—Funds Allocation, 95th Cong., 1st Sess. 194-197, 134-141, 857-861 (1977).

U.S. 332, 336 (1967). Second, the case before us involves a public matter of great national concern and is argued on direct appeal by two public agencies. This is not the routine private lawsuit in which a retrospective application of a law would disadvantage a private party who had relied on a settled body of private law. *See Bradley*, *supra*, 416 U.S. at 716-721. Our decision to apply the 1978 amendments retroactively might make it more difficult, as the Secretary argues, to recover "misspent" funds, but we believe that Congress determined in 1978 that the Department's method for allocating Title I funds thwarted the basic goals of that program.

III

Our decision today, unfortunately, will not bring this protracted controversy to an end. While the record does indicate that several of the school attendance areas in question had low-income percentages in excess of 25 percent, these areas could qualify for Title I funds in any given year under the newer legislation, only if the total amount of funds expended under Title I and similar State programs equaled or exceeded the total amount expended from the combined sources in the preceding year. 20 U.S.C. § 2732(a)(1) (Supp. V 1981). Since the record before us does not allow for such a calculation, the Secretary of Education will be required to make this determination for each school attendance area that had a Title I project in the relevant years.

Accordingly, this matter will be remanded to the Secretary for proceedings consistent with this opinion.

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1991
No. 80-2302

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
PETITIONER IN No. 80-1991

v.

SHIRLEY HUFSTEDLER,
SECRETARY OF EDUCATION,
UNITED STATES DEPARTMENT OF EDUCATION,
RESPONDENT IN No. 80-1991

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER IN No. 80-2302

v.

SECRETARY OF EDUCATION,
UNITED STATES DEPARTMENT OF EDUCATION,
RESPONDENT IN No. 80-2302

PETITIONS FOR REVIEW OF DECISIONS OF THE
UNITED STATES DEPARTMENT OF EDUCATION

Argued May 18, 1981

Before ADAMS, ROSENN, and HIGGINBOTHAM,
Circuit Judges

(Opinion Filed October 13, 1981)

OPINION OF THE COURT

ROSENN, *Circuit Judge.*

These petitions for review of final decisions of the United States Department of Education ("Department" or "Agency")[1] present important questions of first impression in this court. The decisions under review are orders directing petitioners New Jersey and Pennsylvania ("States") to refund to the Department federal funds distributed to the States under the provisions of Title I of the Elementary and Secondary Education Act of 1965 as amended[2]

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[1] The Department of Education was created by the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified at 20 U.S.C. §§ 3401-3508 (Supp. III 1979)) and is the successor agency to the former Office of Education ("OE") in the Department of Health, Education and Welfare ("HEW"). The transfer of functions authorized by the act occurred on May 4, 1980, at the direction of the President. Exec. Order No. 12,212, 3 C.F.R. 255 (1981), *reprinted in* [1980] U.S. Code Cong. & Ad. News 7826. Only the very last stages of the adminsitrative proceedings in the cases before us took place after the transfer of functions. However, for purposes of clarity, the former designations of "Office of Education" and "Commissioner of Education" will be used in this opinion only when precision is necessary, otherwise being subsumed in the references to the "Department of Education" and the "Secretary of Education."

[2] Pub. L. No. 89-10, 79 Stat. 27, *amended by* Pub. L. No. 89-750, 80 Stat. 1191 (1966); Pub. L. No. 90-247, 81 Stat. 783 (1967); Pub. L. No. 91-230, 84 Stat. 121 (1969, *enacted* 1970); Pub. L. No. 92-318, 86 Stat. 235 (1972); Pub. L. No. 93-380, 88 Stat. 484 (1974); Pub. L. No. 94-482, 90 Stat. 2081 (1976); Pub. L. No. 95-112, 91 Stat. 911 (1977); Pub. L. No. 95-561, 92 Stat. 2143 (1978); *and* Pub. L. No. 96-46, 93 Stat. 338 (1979). The various pieces of amending legislation will be referred to by the date contained in their short titles—*e.g.*, 1969 Amendments. Footnote references to public law number and session law citation will be provided as appropriate.

("ESEA") and determined by the Agency audits to have been misapplied under the terms of that Act and its implementing rules and regulations.[3] The States have refused to comply with the Department's directives because they contend that the Agency is without authority under the Act to recover through administrative proceedings Title I funds that were misspent during the years in question.[4] Additionally, New Jersey challenges the correctness of the Agency's audit findings; Pennsylvania challenges the Department's interpretation and application of the Act's statute of limitations and claims that its rulemaking procedures are deficient. We reach only the question of the Agency's claimed authority to issue the orders presently before us and conclude that such authority does not exist. We therefore reverse.

I.

In 1965, as his education program was nearing floor debate in the Senate, President Johnson, com-

[3] 45 C.F.R. pts. 116 & 116a (1980) (to be transferred to 34 C.F.R. pts. 200 & 201 (1981)). In addition to these codified regulations the Agency implements the Act in several less formal manners. For example, the Agency has established mandatory criteria in its program guidelines, which are distributed to nonfederal agencies preparing applications for participation in Title I. The Agency also distributes program manuals to participating entities and will often issue letter memoranda in response to inquiries of local or state educational agencies. *See generally* The National Institute of Education, DHEW, *Administration of Compensatory Education* 5-7 (Report to Congress 1977).

[4] New Jersey's Title I program was audited for the period September 1, 1970 through August 31, 1973. The Department's assessment against Pennsylvania stems from an audit report of that state's program from July 1, 1967 through June 30, 1973.

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menting on the bill that was to become the Elementary and Secondary Education Act of 1965, said: "This bill has a simple purpose: To improve the education of young Americans." [5] Beginning with the ESEA, legislation passed in pursuit of that laudable objective fundamentally altered the federal government's remote role in education. The Senate committee report on ESEA notes this change in direction by quoting Senator Taft's statement expressing Congressional concerns prompting the legislation:

> "Education is primarily a State function, but in the field of education, as in the fields of health, relief, and medical care, the Federal Government has a secondary obligation to see that there is a basic floor under those essential services for all adults and children in the United States."

S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1450. According to educational statistics then before the Congress, the nation had almost fallen below the "basic floor" referred to by Senator Taft and this encouraged federal intervention.[6]

[5] S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong., & Ad. News 1448.

[6] According to the Senate report,

> The purpose of this legislation is to meet a national problem. This national problem is reflected in draft rejection rates because of basic educational deficiencies. It is evidenced by the employment and manpower retraining problems aggravated by the fact that there are over 8 million adults who have completed less than 5 years of school. It is seen in the 20-percent unemployment rates of our 18- to 24-year-olds. It is voiced by our institutions of higher learning and our vocational and technical edu-

Without doubt, the provisions of ESEA Title I effectuated one of the most ambitious federal forays into the educational domain. Confronted with overwhelming evidence of a direct link between economic privation and educational underachievement, Congress authorized a massive [7] infusion of federal funds into the nation's public school systems for the improvement of the educational lot of children from low-income families. In Title I, however, Congress has done more than simply "throw money at a problem." The statutory scheme has been carefully constructed to ensure that the funds appropriated for the benefit of disadvantaged schoolchildren are actually applied and distributed in the most equitable and efficient manner.

For example, the amount of a grant to a particular local educational agency ("LEA") is determined by direct reference to the number of children from low-income families eligible to attend the schools served by the LEA. Pub. L. No. 874, tit. II, § 203, *as added by* Pub. L. No. 89-10, tit. I, § 2, 79 Stat. 27, 28 (1965) (*codified as amended at* 20 U.S.C. § 2711 (Supp.III 1979)). Federal funds are to be distributed only after the state educational agency

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cators who have the task of building on elementary and secondary education foundations which are of varying quality and adequacy.

S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1449.

[7] In Title I's first year, Congress appropriated $775,000,000 to the program. Departments of Labor, and Health, Education, and Welfare Supplemental Appropriation Act, 1966, Pub. L. No. 89-199, ch. II, 79 Stat. 831, 832 (1965). By 1979, funding levels had reached $3,077,132,000. Departments of Labor and Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, tit. II, 92 Stat. 1567, 1577 (1978).

("SEA") to which the particular LEA is responsible has provided assurances that the LEA, under the SEA's direction, will expend the federal monies only on "programs and projects . . . (A) which are designed to meet the special education needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs . . . ." Pub. L. No. 874, tit. II, § 205, *as added by* Pub. L. No. 89-10, tit. 1, § 2, 79 Stat. 27, 30 (1965) (*codified as amended at* 20 U.S.C. § 2734 (Supp.III 1979)).

The federal program prohibits the use of funds to supplant an existing state-funded compensatory education program, requires LEA's to maintain their existing commitment in the area as a condition to continued eligibility, and prescribes that only the excess costs incurred as a result of instituting Title I programs shall be paid with Title I funds. 20 U.S.C. § 2736 (Supp.II 1979). The Act also establishes very definite criteria to be used in identifying the schools and attendance areas in which Title I funds may be expended, 20 U.S.C. § 2732 (Supp.III 1979), as well as the children that may be served. 20 U.S.C. § 2733 (Supp. III 1979). As might be expected, the specificity and complexity of the statutory restrictions on the use of Title I funds are modest when compared with the intricate set of rules and regulations adopted by the administering federal agency. *See* 45 C.F.R. pts. 116 & 116a (1980) *and* note 3 *supra*.

Although this overview of the program might suggest a rigid and pervasive federal presence at all levels of Title I administration, in keeping with traditional governmental roles in education, Congress actually entrusted most of the responsibility for man-

agement to the SEA's and the primary responsibility for innovative program development to the LEA's. Basically, the Act contemplates that each LEA that desires to receive Title I funds will file an application detailing its needs, its eligibility, and the intended uses for the requested funds. This application is submitted to the SEA, which verifies its accuracy and ensures that all proposals conform with current Title I guidelines. The SEA after collecting all LEA applications from its jurisdiction, then submits its own application to the Department for the aggregate sum to which its LEA's are eligible (according to their applications), plus an amount for administration expenses. This application is accompanied by assurances from the SEA that the funds will be used only for lawful Title I purposes.

The resolution of the questions presented by this case therefore is of considerable importance in administering the Title I program. Congress chose to rely heavily on the States to assure proper application of Title I funds, but committed to the Department the authority to adopt such rules and regulations as it deemed appropriate. Such a division of responsibility must inevitably lead to conflicts between the SEA's and the Department over the proper application of Title I funds. When conflicts have developed, the Department has resorted to a variety of procedures, all directly related to its power over the purse strings, to enforce its interpretation of the Act against the States. Some, such as withholding funds or refusing to approve applications, find their roots in the clear and unambiguous terms of the statute in effect when the deposited funds were received. Pub. L. No. 874, tit. II, §§ 206, 210, *as added by* Pub. L. No. 89-10, tit. I, § 2, 79 Stat. 31, 33 (1965) (*codified as amended at* 20 U.S.C. §§ 2832,

2836 (Supp. III 1979)). In this case, however, the Department adopted procedures for the Pennsylvania and New Jersey audit proceedings not clearly authorized by the statute under which the funds were disbursed. It is this variance in procedure that is the genesis of this litigation.

A.

To understand fully the issue we decide today, a brief examination of the administrative proceedings that have brought these cases to us is necessary. The Department, in carrying out its statutory responsibilities, performed separate audits of the Pennsylvania and New Jersey Title I programs. The initial audits were performed by auditors employed by the Department of Health, Education and Welfare Audit Agency ("HEWAA"). In its final audit reports, issued in April (Pennsylvania) and June (New Jersey) of 1975, HEWAA found that both States had misapplied substantial sums of federal Title I monies during the periods under investigation. These reports were forwarded to the Deputy Commissioner for Elementary and Secondary Education, who solicited responses from the States. On May 18, 1976, the Deputy Commissioner issued a final audit determination letter on the Pennsylvania audit. In his letter addressed to the SEA, the Deputy Commissioner sustained the audit findings that $1,346,399.00 had been misspent in Pennsylvania during the audit period and ordered the State to refund that sum to the Department. He sent a similar final audit determination letter to the New Jersey SEA on June 11, 1976, and demanded a refund of $1,161,917.00.

Upon receipt of the Deputy Commissioner's final audit determination letters, both States filed applications for review with the Title I Audit Hearing

Board.[8] Panels of that Board held hearings[9] on the State's objections and, in written decisions dated February 19, 1980, (New Jersey) and May 7, 1980, (Pennsylvania), modified the Deputy Commissioner's findings and assessed audit deficiencies of $1,031,304[10]

[8] The Department's briefs to this court explain that "[a]lthough under no legal requirement to do so, OE created the Board to give [SEA's] a fair opportunity to rebut adverse final audit determinations of the Deputy Commissioner before an independent administrative tribunal."

[9] On June 29, 1979, the Education Appeal Board ("EAB" or "Board"), created by Pub. L. No. 95-561, tit. XII, § 1232, 92 Stat. 2347 (1978) (*codified at* 20 U.S.C. § 1234 (Supp. III 1979)) assumed jurisdiction of all cases then pending before the Title I Audit Hearing Board. 44 Fed. Reg. 43807 (July 26, 1979). However, the transfer of functions caused few practical disruptions because the composition of the EAB was identical to that of the Title I Audit Hearing Board. Pennsylvania, however, claims to have suffered from the transfer because the notice of the establishment of the EAB, given May 25, 1979, 44 Fed. Reg. 30528, which included rules governing procedures before the EAB indicated that the procedures were in effect immediately. Thus, Pennsylvania claims, and the Department does not deny, that the State was forced to try the portion of its case heard after May 25, 1979, under new and unfamiliar rules. Pennsylvania also asserts that the Department's final regulations governing the EAB, substantially identical to the interim final regulations under which post-May 25 hearings were held, were disapproved by Congress pursuant to 20 U.S.C. § 1232(d) (1976 & Supp. III 1979).

[10] This reduction resulted from the application of a five-year statute of limitations enacted in 1974, Pub. L. No. 93-380, tit. I, § 106, 88 Stat. 484, 512, *originally codified at* 20 U.S.C. § 884 (1976), *renumbered and replaced*, Pub. L. No. 95-561, §§ 801(2), 901(b), 93 Stat. 2284, 2305 (1978), *as amended by* Pub. L. No. 96-46, §§ [1](20), 2(a)(3), 93 Stat. 339-40 (1979). *Cf.* Pub. L. No. 90-247, tit. IV, § 452(g), *as added by* Pub. L. No. 95-561, § 1232, 92 Stat. 2347-49 (1978) (prescribing a five-year statute of limitations for refund proceedings effected under the General Education Provisions Act).

against New Jersey and of $422,424.29[11] against Pennsylvania. The Board's decisions were subject to a comment period during which they were forwarded to the Secretary, who declined to review them. The Board's decision as to New Jersey became the final decision of the Department on May 2, 1980; the decision as to Pennsylvania became final on July 16, 1980. Timely petitions for review were filed in this court.[12]

As explained earlier, both Pennsylvania and New Jersey contend that, to the extent the above-described procedures directed the payment of a refund by the SEA's, the procedures were outside the Department's statutory authority. The Department responds by citing two statutory provisions that it urges explicitly authorize the procedures followed in these cases. Alternatively, the Department relies on a common-law right of the Government to recoup grant funds expended in violation of the terms and conditions of the grant. We turn first to the statute.

B.

The Government's dilemma lies not in the unreasonableness of its demands for the return of the

[11] This reduction resulted from an application of the statute of limitations, *see* note 10 *supra* and from a determination that funds had not been misspent in one of the five LEAs that were the subject of HEWAA audit deficiencies.

[12] Jurisdiction of this court is proper under either 20 U.S.C. § 2851 (Supp. III 1979) (authorizing appeals from adverse final action of the Secretary regarding Title I audits) or 20 U.S.C. § 1234d (Supp. III 1979) (authorizing appeals from adverse final action of the EAB).

misspent monies but in the absence of a statutory remedy to compel repayment. The Department first invokes a recent addition to the statutory scheme as authority for its actions in these cases. Title I's section 185 (20 U.S.C. § 2835 (Supp. III 1979)) was added by the 1978 Amendments,[13] which effectively rewrote the entire Act. Section 185 directs that when Title I audits disclose a misapplication of grant funds, the Secretary shall take steps to "assure timely

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[13] Pub. L. No. 95-561, tit. I, § 101, 92 Stat. 2143, 2190 (1978), *adding* Pub. L. No. 89-10, tit. I, § 185. The section reads:

> § 2835. Audits and audit resolution
>
> (a) Auditing.—The Inspector General of the Department of Health, Education and Welfare shall make provision for audits of grants made under this subchapter to determine, at a minimum, the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance with applicable statutes, regulations, and the terms and conditions of the grant or subgrant.
>
> (b) Audit resolution and repayment.—The Commissioner shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits provided for in subsection (a) of this section. Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Commissioner shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

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and appropriate resolution of audit findings and recommendations." This audit resolution process is expressly directed to include repayment of funds "finally determined . . . to have been misspent or misapplied." Pointing out that Section 185, and complementary sections contained in the General Education Provisions Act ("GEPA"),[14] were in effect when final agency action was taken in the cases at bar, the Department claims that the decisions under review simply fulfill the statutory obligations of the Agency to ensure the fiscal integrity of Title I at the state and local level.

The States counter the Department's Section 185 argument by invoking the general rule against retroactive application of statutory enactments:

> "[T]he first rule of construction is that legislation must be considered as addressed to the future, not the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"

Greene v. *United States*, 376 U.S. 149, 160 (1964) (quoting *Union Pacific Railroad* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)). *See United States* v. *Richardson*, 512 F.2d 105, 106 (3d Cir. 1975).

The States further assert that retroactive enforcement of a newly created governmental right of recovery is especially inappropriate in the context of participatory grant programs involving sovereign States. It is, the States contend, in the nature of

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[14] *See* 20 U.S.C. § 1234, 1234a (Supp. III 1979).

a grant program that a prospective grantee may exercise its prerogative not to participate. However, it is argued, for that prerogative to be exercised knowledgeably and, presumably in the case of governmental entities, in the public interest, it is necessary that the prospective grantee be able to assess the potential risks and benefits that would flow from participation. For this court, it is urged, to enforce retroactively a sanction not mentioned when the grantees entered into the program, would impose serious hardship on States operating under budgetary limitations and would result in a dramatic and undesirable reduction in the participation rates for worthy federal grant programs such as Title I.

The States' arguments are persuasive and in harmony with the views recently expressed by the Supreme Court in *Pennhurst State School and Hospital* v. *Halderman*, 49 U.S.L.W. 4363 (U.S. April 20, 1981). In *Pennhurst*, the Court reversed this court's holding that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-81 (1976 & Supp. III 1979) ("DDA"), imposed affirmative obligations on the states to provide mentally retarded persons with appropriate treatment in the environment that would be least restrictive of their personal liberty. *Halderman* v. *Pennhurst State School & Hospital*, 612 F.2d 84, 94, 107 (3d Cir. 1979) (*en banc*). Referring to Congressional authority to legislate pursuant to the Spending Power,[15] the Court stated: "[O]ur cases have long recognized that Congress may

[15] The Spending Power is derived from Congress' authority to provide for the general welfare. U.S. Const. art. I, § 8, cl. 1. Department counsel agreed at oral argument that Title I was enacted in exercise of this power.

fix the terms on which it shall disburse federal money to the States." 49 U.S.L.W. at 4367. The *Pennhurst* Court then proceeded to describe Spending Power legislation as

> much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a state is unaware of the condition . . . . [I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously . . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id.

We recognize that *Pennhurst* is not directly applicable to the cases before us. That case concerned the imposition of affirmative obligations, the costs of which were not fully covered by grant funds. Nevertheless, the overarching principle of *Pennhurst*—that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant—precludes us from giving retroactive effect to a statute passed five years after the last disputed funds were received. Such a result would require repayment of misspent funds out of a state's general treasury. Section 185 does not confer authority on the Department to impose the sanctions it adopted in these cases.

The Department also relies on Section 415 of the General Education Provisions Act ("GEPA"),[16] currently codified at 20 U.S.C. § 1226a-1 (Supp. III 1979), for authority to recoup misspent Title I funds. That section provides:

> Payments pursuant to grants or contracts under any applicable program may be made in reimbursement with necessary adjustments on account of overpayments or underpayments as the Commissioner may determine.

We are at somewhat of a loss to understand the Department's arguments concerning the operative effect of Section 415. The section is entitled "Payments" and purports to prescribe the manner in which federal funds are paid *to the States*. Therefore, it is clear that whatever "adjustments" are authorized under this provision, they are to be accomplished by means of an offset against current or prospective grant fund disbursements to SEA's. The Department's actions in the cases at bar are very much different and it cannot, therefore, invoke the authority of Section 415.

In fairness to the Department, it should be noted that its arguments respecting Section 415 rely heavily on certain statements in the Senate Report on the 1969 Amendments (which first enacted GEPA Section 415 as Section 425), which seem to indicate a much broader remedial power than we have recognized. *See* S. Rep.. No. 91-634, 91st Cong., 2d Sess.

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[16] Pub. L. No. 90-247, tit. IV, § 425, *as added by* Pub. L. No. 91-230, tit. IV § 401(a)(10), 84 Stat. 170 (1970), *renumbered*, Pub. L. No. 92-318, tit. III, § 301(a)(1), 86 Stat. 326 (1972), *renumbered* Pub. L. No. 95-561, tit. XII, § 1231(a)(1), 92 Stat. 2342 (1978).

83-84, *reprinted at* [1970] U.S. Code Cong. & Ad News 2826.[17] A close reading of the report, however, reveals that the language on which the Department relies, printed under a heading of "REPORTS AND AUDITS," was in fact explanatory of Section 424 of the bill, and that the reference to Section 425 was a typographical error. The committee's remarks concerning Section 425 (now Section 415) are in the immediately preceding paragraph of the report.[18]

Section 424, to which the legislative history quoted in note 17 in fact refers, required grant recipients to maintain appropriate records of Title I expenditures and programs and gave Department officials and mem-

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[17] The Department quoted to the court the following passage from the report:

> The language of section 425 is based on a recommendation of the Comptroller General respecting retention of records and audits relating to education programs.
>
> Audit reports on title I of the Elementary and Secondary Act have been valuable to the committee in its review of that program. The committee notes that exceptions have been taken to certain expenditures of title I during the initial years of the program and, to the extent this committee has reviewed those exceptions, they appear to well founded. Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer.

[18] That paragraph reads:

> GENERAL PROVISIONS
>
> Sections 422, 423, and 425 are general provisions concerning the prohibition of Federal control of education, labor standards, and methods of payment. These three sections are a substitute for the numerous similar provisions scattered throughout present law and obviate the necessity of including similar provisions in any further legislation.

bers of the Comptroller General's staff full access to those records "for the purpose of audit and examination." Although not pressed upon the court, we assume the argument that Section 424, in providing the authority to conduct audits, also authorizes the resolution of audit determinations and that the strong legislative history of the section indicates an intent to utilize refunds as a means of resolution. Such an argument is not unreasonable; in the circumstances of this statutory scheme, however, it is unavailable.

As we alluded to earlier, Title I was a fundamental departure from the traditional federal role in education. Public Law 874, which served as the foundation on which the 1965 ESEA was built, limited federal aid to areas directly affected by local federal activity, especially that activity related to the war effort. *See* S. Rep. No. 2458, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Code Cong. & Ad. News 4014. We think it likely, in light of the historic underpinnings and the experimental nature of Title I, that Congress desired to receive accurate and reliable information on the program's strengths and weaknesses. That such information was earnestly sought and utilized is reflected by the number and breadth of the ESEA amendments. *See* note 2 *supra*. Despite the committee's acknowledgment that audit reports had been forthcoming in the past, we believe that Section 424 was enacted as a means of assuring the continued flow of information to the Department and Congress.

We find support for our conclusion in the 1978 Amendments to the Act which, although they augmented the Act with Section 185 and its GEPA counterpart Section 452,[19] both of which explicitly author-

[19] Pub. L. No. 90-247, tit. IV, § 452, *as added by* Pub. L. No. 95-561, tit. XII, § 1232, 92 Stat. 2347 (1978) (*codified at* 20 U.S.C. § 1234a (Supp. III 1979)).

ize the Secretary to demand and collect refunds of misspent monies, left in place Section 424 (*codified as amended at* 20 U.S.C. § 1232f (Supp. III 1979)), without significant amendment. Were we to read Section 424 as authorizing the procedures used and the orders issued in the instant cases, not only would we be ascribing to Congress a useless act in enacting Section 185, but we would be construing the Act to contain plain redundancies. Neither course is appropriate.

The Department has been very thorough in marshalling its arguments before this court. Barely a line of legislative history supporting the existence of recoupment authority during the time these funds were received has escaped attention in its oral argument or brief. The States also have made extensive efforts to support their position in the reports and discussion of Congressional committees and members. The parties' assiduousness, however, has failed to provide the requisite legislative history which compels either interpretation of the statute. In view of this void, we look to the terms of the statute itself for the clarity of expression demanded of Congress when States are asked to put at risk substantial rights and benefits in exchange for their participation in a federal grant program. We have studied this statute carefully; we have also closely reviewed the Department's regulations. We cannot say with the necessary firmness of belief that prior to 1978 Congress conferred upon the Department the authority it here asserts against the States. We are constrained, therefore, to deny the statutory power of the Agency to order repayment of the misspent or misapplied funds.

C.

As an alternative source of authority, the Department invokes the common-law right of the Government to recover money and property distributed contrary to law or under a mistake of fact. *See Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151 (1956); *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-40 (1947); *Wisconsin Central Railroad* v. *United States*, 164 U.S. 190, 206, 211 (1896). Arguing that federal agencies are free—perhaps obligated—to avail themselves of this remedy to recover misspent funds, the Department cites to *United States* v. *Marion County School District*, 625 F.2d 607 (5th Cir. 1980); *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975); and *Utah State Board of Vocational Education* v. *United States*, 287 F.2d 713 (10th Cir. 1961).

Although not willing to concede that a common-law right of recovery exists in the circumstances of these cases, the States argue that even assuming the Department could pursue such a remedy for Title I violations, it would have to do so by instituting an appropriate action in a court of competent jurisdiction. Because all proceedings leading up to the decisions presently under review were conducted at the administrative level, the States contend that those decisions, insofar as they require a refund of misspent monies, are a nullity. In support of their arguments, they cite *School Board* v. *Department of Health, Education and Welfare*, 525 F.2d 900 (5th Cir. 1976).

As evidenced by the citation of authority *supra* at 16-17, there can be no debate concerning the right of the Government "to make contracts and hold and dispose of property, and, for the protection of its prop-

erty rights, . . . resort to the same remedies as a private person." *Rex Trailer Co.* v. *United States*, 350 U.S. at 151. However, where a legislative body provides for liability coupled with a special statutory remedy, "that remedy, and that alone, must be employed." *Pollard* v. *Bailey*, 87 U.S. 520, 527 (1874). *See also National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy . . ., courts should not expand the coverage of the statute to subsume other remedies."). The States have presented a strong argument that by providing for the withholding of funds and disapproval of SEA applications, Congress intended to abrogate whatever common-law causes of action the Department may have had to redress noncompliance with the federal Title I scheme. The Department makes an at least equally persuasive argument, grounded in legislative history [20] and an analysis of the operation of the statutory remedies [21] that Congress did not intend that the Department be without a remedy to recover misspent funds. Therefore, it is argued, if the statute does not provide such authority, Congress must have in-

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[20] The Department especially relies on the enactment, in 1974, of a statute of limitations for recovery of misspent funds. *See* note 10 *supra*.

[21] Withholding and disapproval of applications, it is contended, are effective only to correct current violations of Title I. Once the SEA brings its program into compliance, the withholding must terminate and the application must be approved. Without the availability of a common-law right of recovery, the Agency argues, it is powerless to correct past violations of Title I.

tended to leave the common-law remedies intact. In the circumstances of these cases, we need not now decide whether a common-law right of recovery survived enactment of the ESEA because if such a remedy does exist, the method of distributing Title I monies lends itself to enforcement of that right only by an action in a court of competent jurisdiction.

Of the case relied on by the Department, only *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975) involved a wholly administrative utilization of a common-law right of recovery. In *Mt. Sinai*, HEW withheld funds owing to the hospital for past services rendered to Medicare patients. HEW's action was prompted by the agency's determination that, on other occasions in the past, the hospital had rendered services that were not medically necessary but had nevertheless been paid for with Medicare funds. The hospital brought court action seeking an injunction directing the agency to release the funds and to pay them over to the hospital. The district court granted the injunction, holding that HEW's common-law right of recoupment had been abrogated by enactment of the comprehensive Medicare statute. The Fifth Circuit reversed on the abrogation issue.

The remedy of setoff which HEW sought to employ in *Mt. Sinai*, however, is inappropriate in these cases because of fundamental differences between the funding scheme employed by HEW in *Mt. Sinai* and the scheme under Title I. Medicare funds are distributed to participating health care providers by way of reimbursement for services already rendered. Thus, if HHS [formerly HEW] utilizes its common-law right of setoff, which is available to anyone holding funds owing to another from whom a debt is owing, Medicare beneficiaries still receive treatment, but the Government need not pay for those services outside the

program's coverage. The same remedy was used in *Wisconsin Central Railroad* v. *United States*, 164 U.S. 190 (1896), dealing with recovery of illegally disbursed payments for mail carriage by a land grant railroad, and *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), concerning the offset of "cover costs" resulting from the breach of a government construction contract against an amount owing the defaulting contractor from the completion of other contracts.[22] In contrast, the Department uses an advance-funding method of distributing Title I funds, presumably because school districts are unable to function on an anticipated revenue basis. For the Department to attempt to use an offset remedy, therefore, would result in the failure of the school districts to provide Title I services during the year for which funding was withheld. This is obviously unsatisfactory as it defeats Congressional objectives and it means that the intended beneficiaries of the Act—underprivileged school-children—not only suffer when the funds are misapplied but also when the Department attempts to remedy the misapplication.

The Department has not referred us to any case in which a governmental right of recovery was administratively exercised by a means other than setoff and sustained by a court that had analyzed the issue.[23]

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[22] *See also* Lodge 2424, Int'l Ass'n of Mach. & Aerospace Workers v. United States, 564 F.2d 66 (Ct. Cl. 1977).

[23] The Department's reference to West Virginia v. Commissioner of Education, No. 79-1338 (4th Cir. 1980) (unpublished per curiam) is not helpful, even though that case dealt with an order of the Department resulting from procedures similar to those employed here. The court's opinion fails to reveal that the arguments considered in this opinion were pressed and, in such absence, we will not assume that the Fourth Circuit ruled on the issue that presently confronts us.

We have found only one such case, *Admiral-Merchants Motor Freight, Inc.* v. *United States*, 321 F.Supp. 353 (D.Colo. 1971), and the peculiar facts of that case, coupled with the court's use of equitable estoppel, *id.* at 359, render the case inapposite to the one at bar. Further, the law announced in the case militates strongly against upholding the Department: "[A] legislative tribunal cannot exercise common law or equity jurisdiction unless this authority is expressly granted by the Congress." *Id.* at 359. *See also School District* v. *Department of Health, Education, and Welfare*, 525 F.2d 900 (5th Cir. 1976) (HEW hearing examiner had authority only to determine eligibility of grant recipient, not to order refund or funds dispersed to ineligible grantees).

In the absence of any authority to the contrary, we conclude that the Department, if it retains a common law right to recover misspent Title I funds, may exercise that right only by maintaining a civil action in a court of competent jurisdiction. We note that such a rule assures that the parties to the audit are able to press their arguments concerning the merits of the audit in a judicial forum, either in the Agency-initiated proceedings or in an action seeking to have the Agency remit withheld funds. The Department itself argues to this court that such an opportunity was unavailable to audited parties prior to enactment of the 1978 Amendments. Because neither of the allowable courses were followed in these cases, we may not sustain the orders directing the States to repay the funds determined to have been misspent.

II.

Our decision in these troublesome cases is reached only after carefully weighing the effect it may have

upon a valuable national educational program. Title I is an important cornerstone in the federal aid to education program and, by most accounts, it is proving reasonably successful in securing the advantages of education for the seriously disadvantaged. Misapplication of funds, even though it occurs in a good-faith effort to comply with complex regulatory requirements, detracts from the effectiveness of the program as a whole. It cannot be condoned or dismissed lightly. Administrative agencies, however, are purely creatures of statute, and their authority is statutorily circumscribed. To allow an agency to assume powers that it considers appropriate in carrying out its duties but which have not been allotted to it by Congress would attribute legislative powers to the executive branch and disturb the balance in our tripartite system of government. More important, perhaps, would be the absence of due process in a system where agencies charged with administering the multitude of federal grant programs were free to augment or abridge the rights and obligations forming the contractual basis of the grantees' participation. Title I participants who have received funds after the effective date of the 1978 Amendments have been advised by Congress that they will be held responsible in administrative proceedings with a right of judicial review for Title I funds that are misapplied. Requiring less is simply inconsistent with our concept of fairness.

We therefore hold that an administrative agency has no authority to order repayments of funds misapplied or misspent by federal grant participants unless Congress, at the time the funds are received, has declared its intention to empower the agency to exercise such a remedy. In the absence of Congres-

sional authority, the remedy exists, if at all, only at common law. We further hold that if an agency employing an advance-funding scheme such as that provided for in Title I relies on a common-law right to recover misspent funds, it may do so only by maintaining a civil action in a court of complete jurisdiction.

Accordingly, the petitions for review will be granted and the orders of the Department will be reversed and the cases remanded with instructions to vacate the orders requiring a repayment by petitioners of previously received Title I funds.[24]

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[24] Because we do not reach the issue of the regularity of the proceedings at the agency level, the Department's motion to strike the affidavit of William M. Dallam, appended to petitioner Pennsylvania's reply brief, will be granted.

A. LEON HIGGINBOTHAM, *Circuit Judge*, Concurring.

I concur in the holding of the court, specifically, that the Department was not empowered by statute to order the states to repay the amounts that were determined to have been misspent.

I cannot agree that the issue of what common law remedies the Department may have had is properly before us, because it is clear that no such remedies were exercised by the Department in these cases. I therefore believe that the court's discussion of the scope of the Department's setoff remedy is dictum.

With that understanding, I concur.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

EDUCATION APPEAL BOARD

Docket No. 14-(29)-76

APPEAL OF

THE STATE OF NEW JERSEY
TITLE I, ESEA

DECISION

Appearances: Mark Schorr, and Jane Sommer for the State of New Jersey; Philip H. Rosenfelt and Robert Arnot for the Deputy Commissioner of Elementary and Secondary Education.

I. *Preliminary Statement*

On June 11, 1976 the Deputy Commissioner for the Bureau of Elementary and Secondary Education, Department of Health, Education and Welfare ("Deputy Commissioner") issued a final determination letter to the New Jersey State Department of Education ("New Jersey" or "New Jersey SEA") demanding a refund in the amount of $1,161,917 to satisfy certain claimed deficiencies relating to expenditures by New Jersey through its Newark Local Education Agency ("Newark" or "Newark LEA") of Title I funds during the school years 1970-71 and 1971-72.

The Deputy Commissioner's claimed refunds are based on the H.E.W. audit agency's findings of June 20, 1975, which are summarized in Enclosure No. 1 to the Deputy Commissioner's letter of June 11, 1976, as follows:

a. $91,266 in Title I funds were improperly spent during the 1970-71 school year at the Lafayette

School, which was found to be ineligible for such funds on the basis of the low-income percentage shown on the face of Newark's application to the New Jersey SEA.

b. $41,102 in Title I funds were improperly spent during the 1970-71 school year at 10 Newark schools because these schools were not listed in the LEA's application as eligible for Title I funds.

> (By reason of the application of the federal statute of limitations, 20 U.S.C. § 884 (Supp. IV 1974), it has been stipulated that all but $1,674 have been eliminated from the above two claims. Attempts at settlement failed; and the parties have requested the panel to determine whether the Deputy Commissioner is entitled to the reduced claim for $1,674.)

c. $1,029,630 in Title I funds were improperly spent during the 1971-72 school year because the method used by the Newark LEA to determine the eligibility of attendance areas deviated from the applicable Title I regulations, and particularly § 116.17 (d) thereof. Ten elementary schools and three secondary schools were found to have been ineligible.

On May 12, 1977, the undersigned Panel of the Education Appeal Board (formerly the Audit Hearing Board) met to consider New Jersey's appeal at a pre-hearing conference. The points agreed on at this conference were summarized in a pre-hearing conference statement issued by the Panel on June 29, 1977. Pursuant to the schedule adopted by the Panel at that pre-hearing conference, counsel then exchanged written interrogatories and responses were made.

On September 2, 1977, New Jersey filed a motion to compel answers to certain of its interrogatories to

which the Deputy Commissioner had objected and the Deputy Commissioner responded to this motion.

The Panel considered the papers submitted and by a memorandum opinion and order dated February 10, 1978, held that it does not have authority to compel discovery, including answers to interrogatories, and that the Panel's role is limited to encouraging the parties to undertake voluntary discovery.

The Panel went on to advise the parties with respect to whether several of the New Jersey interrogatoreis objected to by the Deputy Commissioner could, in the Panel's opinion, be answered and to what extent. This, however, was simply informal advice to counsel for the parties.

On March 31, 1978, counsel for both parties filed a joint pre-hearing memorandum, together with New Jersey's statement of factual and legal contentions and the Deputy Commissioner's statement of the issues presented and his position thereon. In their joint pre-hearing memorandum, counsel for the parties indicated that neither party requested an evidentiary hearing at that time, *i.e.*, March 1978.

On April 17, 1978, the Panel adopted the briefing schedule that had been jointly proposed by both parties. The following briefs were filed on the in-indicated dates:

a. On June 2, 1978, New Jersey filed its main brief together with an affidavit of Bernard J. Brandwene and an appendix and certain exhibits.

b. On August 4, 1978, the Deputy Commissioner filed its main brief, together with certain exhibits, including Exhibit F, the affidavit of Alan Bergman.

c. On September 11, 1978, New Jersey filed a letter reply brief, and on November 9, 1978, New Jersey filed a supplemental affidavit of Bernard J. Brandwene.

d. On September 12, 1978, New Jersey filed a motion to suppress the affidavit of Alan Bergman and the Deputy Commissioner responded.

e. On January 9, 1979, the Deputy Commissioner filed a supplemental affidavit of Alan Bergman.

f. On January 10, 1979, the Deputy Commissioner filed comments concerning the supplemental affidavit of Mr. Brandwene.

The Panel considered New Jersey's September 12, 1978 motion to suppress and by memorandum order dated March 8, 1979, denied it. At the same time, it noted that neither party had requested an evidentiary hearing and certain other matters. In its memorandum the Panel requested that counsel for the parties address the following principal issues at oral argument:

(1) Whether the Commissioner of Education is without jurisdiction to compel New Jersey to refund the Title I monies allegedly improperly spent.

(2) Whether the New Jersey SEA, in approving the Newark LEA's 1971-72 Title I project application, failed to comply with the then prevailing regulations establishing project eligibility.

(3) Whether New Jersey's recalculation of low income percentages made after the acceptance of the project application by the SEA and approval of the Office of Education of the grant award are relevant to this appeal.

(4) If so, whether the method used by New Jersey in making its recalculation meets the then applicable Office of Education regulations and program criteria for Title I program awards.

(5) If so, whether such calculation supports New Jersey's contention that the grant was properly made and no refund is required.

(6) Assuming that the answer to any of the foregoing three questions is in the negative, is there any other ground whereby the grant award to the Newark LEA may be supported, including possible designation of the Newark LEA as a district-wide Title I target area?

With respect to all but the second issue, the parties stipulated that the issues have been joind. With respect to the second issue, the New Jersey SEA does not contend that Newark's LEA-71-72 Title I application complied with the then prevailing regulations establishing project eligibility.

Counsel for the parties ably and thoroughly addressed the principal issues at an oral argument on June 21, 1979. At this argument the Panel rejected counsel for New Jersey's request to introduce a further supplemental affidavit of Bernard Brandwene, an accountant for New Jersey, in view of the lateness of the offer and New Jersey's prior agreement to waive an evidentiary hearing. We will now consider the various issues.

II. *Findings of Fact and Conclusions*

A. *Deputy Commissioner's reduced claim for $1,674 refund for the 1970-71 school year.*

As noted above, the parties have stipulated that all but $1,674 of claim "a" ($91,266) and claim "b"

($41,102) have been eliminated by application of 20 U.S.C. § 884 (Supp. IV 1974), the federal statute of limitations. At oral argument counsel for New Jersey submitted the question of its obligation to refund the $1,674 on the bases of points 1 and 4 of its principal brief, filed June 2, 1978, and counsel for the Deputy Commissioner submitted on the basis of Appendix A to its principal brief filed August 4, 1978, which addresses points 1 and 4 above. Point 1, which challenges the Commissioner's authority to require SEA's to refund Title I funds determined to have been improperly spent, is resolved against New Jersey in Part B, below. Point 4, which contends that Newark could have been declared a district-wide Title I target area during the 1971-72 school year, is not relevant to the audit findings relating to the 1970-71 year because New Jersey does not include any evidence concerning the variance in low-income percentages in Newark during the latter year. Nor do we see how such a conclusion can be deduced from the evidence relating to the 1971-72 year with regard to Newark's being a district-wide target area, which we in fact reject below. (See *infra* paragraph G.) Hence, the Deputy Commissioner's reduced claim for the $1,674 refund is sustained.

B. *Whether the Commissioner of Education is without jurisdiction to compel New Jersey to refund Title I monies allegedly improperly spent.*

New Jersey claims that the Commissioner is without authority to seek refund of monies allegedly misspent under the Title I grant from the U.S. Office of Education. In principal support of this claim, New Jersey asserts that the Commissioner's remedies under Title I are limited to his power to withhold

funds prospectively (20 U.S.C. 241j). The cited statute provides that, whenever the Commissioner finds a failure to comply substantially with any assurance contained in an SEA's application, he may notify the SEA that further payments will be withheld until he is satisfied that there is no longer any such failure to comply. New Jersey argues that an administrative agency must keep within the powers expressly conferred by law, that its jurisdictional grant should be strictly construed, and that the power to demand refunds cannot be implied from the purpose of the basic legislation, which is to pay-over monies to SEAs to meet the special educational needs of educationally deprived children. New Jersey further argues that the Congress knows how to grant express administrative powers to recoup allegedly misspent funds as, for example, in 20 U.S.C. § 631, dealing with construction of urgently needed school facilities in federally impacted areas. Further, New Jersey cites Section 9(b) of the Administrative Procedure Act (5 U.S.C. § 558(b)) which provides that "a sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." Thus, New Jersey concludes that because no authority is expressly set out in the enabling statute and none can reasonably be attributed to any conceivable educational purpose, the authority does not exist and the Commissioner is without jurisdiction to require a refund.

The Deputy Commissioner, in response, finds statutory authority for refund proceedings in Section 435 of the General Education Provisions Act, 20 U.S.C. § 1232d, which authorizes the Commissioner to make "adjustments on account of overpayments or underpayments as the Commissioner may determine." In

response to New Jersey's assertion that nothing in the legislative history of Title I suggests that the Commissioner has the power to compel refunds, the Deputy Commissioner cites the Senate report accompanying Section 435, which notes that in prior years audit exceptions had been taken to certain Title I expenditures and that "they appear to be well founded," and "must be enforced if the Congress is to carry out its responsibility to the taxpayers." Sen. Rep. No. 91-634, 91st Cong. 2d Sess. 83-84 (1970). The Deputy Commissioner also finds Congressional intent in the five-year statute of limitation provision enacted in 1974 (20 U.S.C. § 884), in that there would have been no purpose in limiting recoupment to a five-year period prior to receipt by the SEA of final written notice that certain payments were unauthorized if in fact there were no authority in the Office of Education to recoup those payments during the five-year period. The Deputy Commissioner also argues that the Commissioner has a common law right to recoup allegedly misspent monies.

The Panel has given careful consideration to the pros and cons of this basic jurisdictional challenge. We believe that the issue may not have been free from doubt prior to the time that Congress enacted the 1974 statute of limitations. But by that action Congress must have recognized the Commissioner's authority to recoup when it decided to put a time limitation on that very authority. While this is not an express delegation of jurisdiction, it comes close enough, in our view, to satisfy APA Section 9(b). It also indicates a legislative intent expressed with respect to Title I programs which precedes the Deputy Commissioner's final determination letter of June 11, 1976. This issue has been considered and similarly resolved in the Com-

missioner's favor by at least three other panels,* and may ultimately be raised and determined in an appropriate judicial forum. For these reasons, we conclude that the Commissioner is not limited to withholding of future funds but may recover funds improperly spent within the applicable limitation period.

C. *Whether the New Jersey SEA, in approving the Newark LEA's 1971-72 Title I project application, failed to comply with the then prevailing regulations establishing project eligibility.*

As noted above, the New Jersey SEA admits it did not meet the Title I requirements for determining the eligibility of school attendance areas for Title I funding when it approved Newark LEA's 1971-72 project application with respect to 13 Newark schools. Under Section 142(a) of Title I of the basic statute (20 U.S.C. §241f(a)), a state desiring to participate in the Title I program must give an assurance to the Office of Education ("OE") that it will only approve LEA projects which meet Title I requirements and that it will enforce all obligations imposed on LEAs under 45 C.F.R. § 116 et seq. The New Jersey SEA gave OE such an assurance.

1. *The basic eligibility standards for Title I grants.*

The basic eligibility standard for Title I grants to LEAs at the time in issue (20 U.S.C. § 241e(a)(1)) was that payments under the Title be used for proj-

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* *Appeal of the State of New Mexico*, Docket No. 5-(20)-76 (Decision, August 17, 1979); *Appeal of the State of Pennsylvania* Docket No. 10-(25)-76 (Ruling on Prehearing Motion, May 9, 1978), *Appeal of the State of Texas*, Docket No. 7-(9)-74 (Decision, May 10, 1976).

ects designed to meet the special educational needs of educationally deprived children in "school attendance areas having high concentration of children from low-income families." Implementing this provision, § 116.17(d) of the Title I regulations (45 C.F.R. 116.17 (d)) interpreted the quoted statutory language as including: (1) attendance areas in which the number of children from low-income families is as large as, or larger than, the average number of such children in the various attendance areas of the school district; and (2) attendance areas in which the percentage of children from low-income families is as large as, or larger than, the percentage of such children in the school district. Section 116.17(d) also permitted an entire school district to be designated as eligible but only when there was no wide variance in the number or percentage of children from low-income families. For convenience, a copy of § 116.17(d) is attached to this Decision.

In addition, OE published Program Guide No. 44 (issued March 18, 1968) which provided additional instructions for selecting eligible attendance areas. In brief, the Guide provided that for each "attendance area" data must be obtained on (a) the total number of children who, according to their ages, are *eligible* to attend the public school serving that area and (b) the number of such children who are from low income families. Further, it provided that in all cases the number of children considered *eligible* to attend a particular school consists of all children of the appropriate ages, including children attending private schools and children who have dropped out of school.

In addition, the Guide suggested a number of sources of data to determine the number of children from low income families, and primarily two sources:

1. the number of children in families receiving Aid to Families with Dependent Children ("AFDC"), and
2. the number of children receiving free lunches.

It further indicated that housing, health or employment statistics could also be used but that whatever data were used had to be used uniformly throughout the applicant's school district.

Finally, the Program Guide provided a special method for ranking of attendance areas where the schools do not have well defined attendance area boundaries.

2. *The Newark LEA's method of computing low-income percentages listed on its 1971-72 Title I project application admittedly violated the requisite eligibility requirements.*

In determining the eligibility of attendance areas for the 1971-72 school year, the Newark LEA stated in its Title I application that it had relied on one source, the AFDC statistics supplied by the Essex County Welfare Board. Using this source, and employing the following ratio it arrived at a district-wide low-income ratio of 33.9% (32,352 AFDC children divided by the total school age children population of 95,780).

$$\frac{\text{Total Number of Children from AFDC Families in All Attendance Areas}}{\text{Total Number of Children Considered Eligible to Attend Public Schools Serving All Attendance Areas}} = \text{Percentage of Children from Low-Income Families}$$

This method complied with 45 C.F.R. 116.17(d).

Next, under § 116.17(d), the eligibility of a school attendance area is dependent on the relationship between (a) the total number of children *eligible to attend the public school* serving the attendance area, including those attending private schools and those

who had dropped out of school and (b) the number of such children from low-income families. For individual school attendance areas (and as a corollary to the method the LEA used to compute the district-wide low-income percentage) this relationship can be expressed as the following ratio:

$$\frac{\text{Total Number of Children from Low-Income Families in the School Attendance Area}}{\text{Total Number of Children Considered Eligible to Attend the School}} = \text{Percentage of Children from Low-Income Families in the School Attendance Area}$$

However, the Newark LEA did not use this ratio to compute the low-income percentage for the individual school attendance areas. Because of the incompleteness of the available AFDC statistics (which omitted children attending private and special education schools), the LEA decided to use an alternative ratio permitted by Program Guide 44 under certain conditions. The Guide recognized that in those instances where schools may not have ". . . well-defined attendance area boundaries or receive numbers of children from outside the areas that have been designated for those schools . . .," it may be necessary to use a different ratio, which bases the ranking of the attendance areas for such schools on the ". . . percentage or number of children actually enrolled in [rather than eligible to attend] these schools. This ratio can be expressed as follows:

$$\frac{\text{Total Number of Children from Low-Income Families Enrolled in a Specific School}}{\text{Total Enrollment in a Specific School}} = \text{Percentage of Children from Low-Income Families Enrolled in the Specific School}$$

Although the above ratio was not applicable to Newark, which had well-defined attendance areas, the

HEW auditors recognized that Newark had used it because the incompleteness of the AFDC statistics left no other reasonable approach and acknowledged that it was "a reasonable alternative under the circumstances." But the auditors went on to state that, instead of following the above alternative ratio, the Newark LEA:

> . . . devised hybrid ratios which deviated from the method specified in the program guide. The results were unacceptable since there were no direct relationships between the component elements. For each public elementary school, [Newark] included in the numerator the number of [AFDC] children enrolled in that school as well as the total number of [AFDC] children residing in the school attendance area who were enrolled in junior and senior high schools. However, [Newark] limited the data in the denominator to the total enrollment of the elementary school. There was therefore no meaningful relationship between the data shown in the ratio, namely the total [AFDC] statistics for the attendance area and the elementary school enrollment. Lacking this correlation, the ratio had basic mathematical flaws which tended to inflate the low-income percentage for individual elementary school areas and thus to increase improperly the number of eligible attendance areas.

(Final Audit Report, pages 10-11; Tab C, pages 10-11)

Thus, while the Newark LEA used the proper *denominator* (total enrollment in a particular school), it also, as it has admitted, improperly inflated the *numerator* by including not only the AFDC children

who were enrolled in the particular elementary school but also AFDC children residing in that school's attendance area who were enrolled in junior and senior high schools.

Correctly recalculating the low-income percentages for each of the 41 elementary schools presented as eligible in Newark's Title I application on the basis of the above alternative method, the auditors found that 10 of the 41 schools had low-income percentages that were lower than the district-wide average of 33.9 percent. Thus, these ten schools were ineligible for Title I funding. The Panel accepts the auditors' findings, which are consistent with the underlying evidence.

Similarly, the auditors found that Newark had used a different (and also incorrect) method to compute the low-income percentages for the junior and senior high schools. This method involved, as New Jersey has acknowledged, the LEA computing the low-income percentages for junior and senior high schools by averaging the low-income percentages of the "feeder or pipe-line" elementary schools. New Jersey has also recognized that it approved the LEA's 1971-72 Title I project application despite the fact the application contained these errors. In its initial brief, (p. 19) New Jersey acknowledges that

> The flaw in the initial formula was that it tended to inflate low-income percentages in attendance areas in that its numerator consisted of all low-income students in an area while its denominator described only elementary school enrollment.

On the basis of this admitted "flaw" in the formula used, three of the junior/senior high schools were found to be ineligible for Title I funds during the 1971-72 project year.

D. *Whether New Jersey's recalculation of low income percentages made after the acceptance of the project application by the SEA and approval by the Office of Education of the grant award are relevant to this appeal.*

It is New Jersey's position that the recalculations submitted in the affidavit and first supplemental affidavit of Bernard Brandwene, an accountant, support its contention that the grant was properly made and no refund is required, with the exception of the Garfield School and the Hawkins School ($18,779), which New Jersey concedes remain ineligible even under Mr. Brandwene's recalculations. New Jersey further recognizes that "these calculations are in fact an acknowledgment of the fact that there were irregularities in the original grant approval process," Transcript of Oral Argument, June 21, 1979, (p. 26). The Deputy Commissioner contends the three secondary schools (Clinton Place, Weequahic and East Side), for which $157,878 of Title I funds were spent, and for which New Jersey has provided no recalculations should also be excepted. Thus, even if the Panel were to accept the recalculations, $342,657 in Title I funds may have been improperly allocated.

Putting to one side the merits of the recalculations, the threshold question is whether they are relevant to this appeal.

New Jersey advances what is essentially an equitable argument: in justifying what it has done, a state should be able to rely on any evidence relevant to the Board's primary mission, which is to determine whether the Title I funds were used in schools which, in fact, met the eligibility requirements of the federal regulations, and thus met the special educational needs of educationally deprived children, the underlying

policy of Title I. New Jersey refers to the decision of another panel which admitted "substantially similar *ex post facto* evidence" as instructive. *Appeal of California*, Docket No. 4-(15)-75 (Decision, July 6, 1977). In that case, the original application of a California School District for a Title I program clearly indicated on its face that one of the elementary schools to be included was not eligible: *i.e.*, that the application met neither of the 45 CFR § 116.17(d) requirements, since both the *percentage* and the *absolute* number of children from low-income families in the school were *below* the district-wide average. During the appeal, California submitted supplementary evidence to the panel which indicated that the original application was erroneous and that the school was in fact eligible to participate in the District's Title I program. The panel recognized that the situation confronted it with a difficult choice. On the one hand, the District's application was clearly defective, the SEA had incorrectly approved it, and no steps were taken to correct the error until after the project year was completed; the state had also failed to follow the obvious and clearly defined federal regulations in the application approval process and therefore it was apparent that the relevant portion of the Title I award should be refunded to the Federal Government. On the other hand, since the school was in fact eligible to receive Title I funds, no misuse of the funds was really involved. "With some misgivings," the panel decided no refund should be required for the following reasons: (1) the panel recognized that for the goals of this major federal grant program to be reached, it was necessary that specified procedures be followed and explicit information supplied; (2) occasional failures to do so, which could be described as

"unavoidable human error," were to be expected; (3) if such errors occurred regularly, they became a pattern of conduct which could be viewed as "administrative negligence"; (4) such a pattern could jeopardize the very legislative purpose of this multi-billion dollar federal education program; (5) here, since the panel was confronted with one isolated case, it could not conclude that serious "administrative negligence" existed with respect to the state's review of school district applications generally. Accordingly, the California panel concluded that the mistake involved was a technical one, the result of an isolated human error, and that no repayment should be required.

In this case, the Deputy Commissioner counters New Jersey's argument with several points. Perhaps the most persuasive is that if the Panel is to accept after-the-fact documentation and recalculations, the review function could be rendered meaningless; it would in effect convert the Panel into an auditor, which is not its designated function; further, the HEW auditors could not conduct an effective audit if the grantees were permitted, years after the funds had been spent, to use new methods for computing attendance area eligibility. The Deputy Commissioner also seeks to distinguish the California appeal by pointing out that it involved only one (not thirteen as is the case here) school in the district in question, and that it involved only a computational error, not the use of an improper eligibility formula that inflated the low-income percentages for all school attendance areas in the entire school district.

We do not accept the Deputy Commissioner's basic position that under *no circumstances* should a panel consider after-the-fact evidence. The California appeal is a case in point: a single instance involving a

technical (in this case, computational) error. We are not, however, convinced that the New Jersey multi-school situation fits within the California rationale. However, in view of the conclusions we reach below regarding the merits of New Jersey's recalculations, we need not reach the question of their relevance to this appeal.

E. *Assuming New Jersey's post-hoc recalculations are relevant to this appeal, does the method used by New Jersey in making its recalculations meet the then applicable Office of Education regulations and program criteria for Title I program awards?*

New Jersey contends that its recalculations of low-income percentages for the ten elementary schools in question used the method suggested in Program Guide #44:

> "The flaw in the initial formula was that it tended to inflate low-income percentages in attendance areas in that its numerator consisted of all low-income students in an area while its denominator described only elementary school enrollment. In contrast, the ratio used for the recalculations had a numerator comprised of all low-income children from the area while the denominator was made up of *all* children from the attendance area enrolled in elementary, junior high, *and* senior high schools." New Jersey's Initial Brief, pp. 19-20.

In making its recalculations, New Jersey claims to have relied on the following paragraphs of the Program Guide:

"Some schools have no well-defined attendance area boundaries or receive numbers of children from outside the areas that have been designated for these schools. It may be necessary to base the ranking of the attendance areas for such schools on the percentage or number of children from low-income families actually *enrolled* in those schools while recognizing that other children, as explained below, will be included in the 'target population' if the area is found to have higher than average concentration of children from low-income families."

"The purpose of the attendance area requirement is to identify the 'target populations' of children who are to be considered for participation in Title I activities on the basis of educational deficiency and need for special services. Thus, *for schools without well-defined boundaries or where children have been transferring in or out on open enrollment or freedom-of-choice plans, the* 'target population' should include (a) all of the children who are attending the particular public school which on the basis of enrollment has a high concentration of children from low-income families; (b) children who have been attending that school; and (c) children who would be attending that school if they were not attending a private school or another public school under a freedom-of-choice, open enrollment, or another plan designed to bring about desegreation." (Sa 43) (emphasis added)

Based on its interpretation of the above paragraphs, New Jersey considered data based on the *total* number of children eligible to attend the public schools serving

the various attendance areas and the *total* number of low-income children from the respective areas.

New Jersey's reliance on the above paragraphs appears misplaced. As discussed above, the Program Guide includes an alternative method for ranking attendance areas where the schools do not have well-defined attendance boundaries. Although, in the opinion of the HEW auditors, the Newark LEA had well-defined attendance boundaries, they still found it appropriate for New Jersey to use the alternative method of ranking. But, as the Panel reads the above paragraphs, the Guide's intent was that under the alternative method schools were to be ranked on the basis of the percentages of low-income children enrolled in each particular school.

As previously stated, the alternative method in the program guide can be stated:

$$\frac{\text{Total Number of Children from Low-Income Families Enrolled in a Special School}}{\text{Total Enrollment in a Specific School}} = \text{Percentage of Children from Low-Income Families}$$

In its original calculation New Jersey had included in the numerator not only the number of AFDC children enrolled in that particular school but also the total number of AFDC children residing in that school's attendance area enrolled in junior and senior high schools.

In its recalculatins of low-income percentages, instead of correcting the numerator to include only those children from AFDC families enrolled in a particular elementary school, New Jersey has added an improper denominator to the LEA's previous improper numerator, *i.e.*, both the numerator and the denominator incorrectly included children enrolled in junior and senior high schools. This "aggregate enrollment" does not appear to be authorized by either 45 CFR 116.17(d) or Program Guide #44.

As stated in the affidavit of Alan Bergman, an HEW auditor, the second "hybrid" ratio had the following inflationary effect:

> The method used by the SEA to recalculate eligibility (combining enrollment data from junior and senior high schools with enrollment data from the individual elementary school) had the effect of inflating the low-income percentages for all but one of the individual elementary schools in question. The SEA's method had this effect because the junior and senior high schools had higher percentages of low-income enrollment than the elementary schools, as shown below:
>
> | | |
> |---|---|
> | Percentage of low-income enrollment for the ten elementary schools in question | 23.8* |

* These low-income percentages were calculated by dividing the total AFDC enrollment (for each category of schools) by the total enrollment in that category. The statistics used in making these calculations were taken from the LEA's 1971-72 project application and the listing of AFDC enrollment statistics that was furnished to the LEA by the Essex County Welfare Board (a copy of this AFDC listing is attached as Exhibit A).

> | | |
> |---|---|
> | Percentage of low-income enrollment for the junior high schools included in the SEA's recalculations | 50.9 |
> | Percentage of low-income enrollment for the senior high schools included in the SEA's recalculations | 35.2 |

By including the junior and senior high school enrollment data (which had higher concentrations of low-income students) the recalculated elementary school percentages were inflated as shown below:

Elementary School	The 1971-72 low-income enrollment percentage for the individual school attendance area based on the AFDC and enrollment statistics and as computed by the HEWAA auditor	The 1971-72 low-income enrollment percentage for the school attendance as recomputed by New Jersey SEA
Madison	28.8	39.7
Newton St.	31.5	42.8
So. 17th St.	33.5	40.3
Central Ave.	29.4	41.4
Burnet St.	30.2	39.0
Waverly Ave.	31.9	37.2
Franklin	32.4	34.8
M. Garvey	22.9	36.1
Garfield	20.6	26.0
Hawkins	30.3	25.9

In summary, in combining enrollment data from junior and senior high school with enrollment data from individual elementary schools New Jersey employed an impermissible method. By building the junior and senior high school enrollments, which had higher concentrations of low-income students, into the ratio, New Jersey inflated the elementary school low-income percentages so that eight of the ten originally disqualified schools became qualified. New Jersey's method of recalculation is unacceptable.

F. Assuming New Jersey's post-hoc recalculations are relevant to this appeal, do such recalculations support New Jersey's contention that the grant was properly made and no refund is required?

Based on the foregoing analysis, the Panel's answer to this question must be "no."

G. *Assuming that the answer to any of the foregoing three questions is in the negative, is there any other ground whereby the grant award to the Newark LEA may be supported, including possible designation of the Newark LEA as a district-wide Title I target area?*

New Jersey contends that "under regulations applicable in 1971 and consistent with the clearly expressed intent of Congress, the whole of the Newark school district could have been considered educationally disadvantaged so as to be a Title I area." Initial Br. p. 22, see pp. 22-28.

At the time of the Newark's submission of its 1971-72 application, 45 CFR § 116.17(d) provided in part:

> . . . In certain cases, the whole of a school district may be regarded as an area having a high concentration of [*children from low-income families*] and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district.

Newark did not apply under the above "no wide variance" rule to have the New Jersey SEA declare the entire Newark school district eligible for Title I services. Nor did New Jersey, when it approved Newark's 1971-72 application, determine that Newark qualified as a "no wide variance" district.

Nonetheless, New Jersey now contends, for the first time, that the Newark LEA was in fact so qualified. New Jersey first points to certain legislative history, relevant to Title I of the ESEA of 1965 and in particular to a 1965 Senate Committee Report which stated, inter alia: "There may be circumstances where a school system is basically a low-income area and the

best approach in meeting the needs of educationally deprived children would be to upgrade the regular program." Senate Rep. No. 146, 89th Cong., 1st Sess., reprinted in [1965] U.S. Code Cong. & News 1454. New Jersey next refers to a 1966 House Labor and Education Committee Report reaffirming this position:

> *"We specifically pointed that there may be circumstances where a whole school system is basically a low-income area and in which the best approach might be to upgrade the whole school system.* The first year programs involving a general upgrading of whole school systems were discouraged by the Office of Education. The construction of facilities to house Title I programs was permitted only sparingly. This restricted approach was necessitated by limited funds. In the next two years, especially in fiscal year 1968, more funds will be available and more children will be included in Title I programs. It is expected that more general upgrading of school systems and more construction will be permitted. *It is the feeling of the Committee that when 30 or 40 percent of the children in the district are from low-income families, all of the children in the district could be considered disadvantaged and the whole school system could be upgraded."* House Report No. 1814, 89th Cong., 2d Sess., reprinted in [1966] U.S. Code Cong. & Ad. News 3846 (emphasis added).

New Jersey claims that the district-wide low-income percentage for Newark for school year 1971-72 (33.9 percent) fits this model. Finally, New Jersey emphasizes that the narrative portion of the 1971-72 application shows Newark to have been uniformly disad-

vantaged in other important respects, citing high unemployment (14%), the highest percentage of slum housing in the nation, the highest incidents of crime, and the second highest birth rate. Also, in 1970-71 Newark had the highest population turnover in the nation, mobility rates reaching as high as 80 percent for schools in the Title I area. Hence, the Newark LEA had no choice but "to assume high concentrations of low-income families in all attendance areas and to attempt to spread the benefits of Title I as broadly as possible to assure that most educationally deprived children would be served." Initial Br. p. 25

The Deputy Commissioner answers New Jersey as follows:

1. Newark did not seek, under the "no wide variance" rule, to have the New Jersey SEA declare the entire Newark school district eligible for Title I services. Nor did New Jersey, when it approved Newark's application, make such a determination. Therefore it is irrelevant whether the Newark LEA could have qualified had it made such a request.

2. Even if the Newark LEA had made such a request in its 1971-72 project application, it clearly would not have qualified as a "no wide variance" district.

3. The "no wide variance" rule, 45 CFR 116.17(d), begins: "In certain cases the whole of a school district . . ." etc. "In certain cases" is left undefined, allowing LEAs to make these determinations by applying a reasonable standard of "no wide variance" subject to the approval of the SEA.

4. Since Newark's 1971-72 application shows a variance in low-income percentage from a high of 84.7 percent to a low of 10 percent, the Newark LEA's variance during the period in question was 74.7 percent. Under no conceivable interpretation of the "no wide variance" rule could a variance of 74.7 percent be deemed acceptable. Hence, Newark never could have qualified.

5. With respect to the statement from the 1966 House Labor Committee report (on which New Jersey relies) that "when 30 or 40 percent of the children in the district are from low-income families all of the children in the district could be considered disadvantaged," such legislative statement has no relevancy to Newark's 1971-72 Title I project. Neither the Title I statute nor the Title I regulations at the time provided for such an exception and OE did not consider this single statement an adequate basis for issuing a new regulation or amending the "no wide variance" rule since it was inconsistent with the basic Title I policy of meeting the special educational needs of only educationally deprived children.*

Having carefully considered both New Jersey's arguments and the Deputy Commissioner's counterarguments, the Panel has concluded that under the then applicable regulations the whole of the Newark school district could not have been considered educationally disadvantaged so as to come within the "no wide variance" rule and so as to be designated a district-wide Title I target area.

III. *Summary*

Based on the foregoing recitals and the record made in this proceeding, it is the conclusion of the Panel

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* Since the Board is not authorized to determine whether the regulations are consistent with the statute and the expressed legislative intent, the Panel must apply the regulations on the assumption they are valid.

that New Jersey should make the following payments to the U.S. Office of Education:

1. $1,674 in Title I funds relating to items a. and b. of Enclosure No. 1 to the Deputy Commissioner's letter of June 11, 1976.

2. $1,029,630 in Title I funds relating to item c. of Enclosure No. 1 to the Deputy Commissioner's letter of June 11, 1976.

Pursuant to Sections 100e.81 and 100e.82 of the interim federal regulations establishing procedures for the Education Appeal Board (44 Fed. Reg. 30528, May 25, 1979), this Decision is transmitted to the Commissioner and to the parties, and each party is given notice that it may submit written comments thereon to the Commissioner within a period of twenty-five (25) calendar days from receipt of the Decision. This Decision shall become the final decision of the Commissioner unless, within sixty (60) days after the State of New Jersey's receipt of the Decision, the Commissioner modifies or sets aside the Decision.

ALOYSIUS B. MCCABE
ROBERT MILLER
FRANKLIN M. SCHULTZ
Education Appeal Board Panel

By /s/ Franklin M. Schultz
FRANKLIN M. SCHULTZ
Chairman

Dated: February 19, 1980

APPENDIX D

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office of Education
Washington, D.C. 20202

May 7, 1980

CERTIFIED MAIL
Honorable Fred G. Burke
Commissioner of Education
State Department of Education
Trenton, New Jersey 08625

Reference: Appeal of the State of New Jersey
Docket No. 14-(29)-76
Audit Control No. 50006-02

Dear Commissioner Burke:

A copy of the Panel's decision in the above-referenced appeal was sent to New Jersey on February 27, 1980, and received March 4, 1980. It is my duty to inform you that the Panel's decision, after the appropriate period for comment and review, now stands as the final decision of the U.S. Department of Education. In its decision, the Panel ruled that New Jersey should refund $1,031,304 to the Department of Education. Appropriate authorities within the Department will be in touch with you at an early date to discuss the method of repayment of the funds in question.

These proceedings before the Board now are closed.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

No. 80-1991

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION, PETITIONER

v.

SHIRLEY HUFSTEDLER, SECRETARY OF
EDUCATION, UNITED STATES DEPARTMENT
OF EDUCATION, RESPONDENT

ON PETITION FOR REVIEW OF DECISIONS OF
THE UNITED STATES DEPARTMENT OF EDUCATION

ON REMAND FROM THE SUPREME COURT OF
THE UNITED STATES

Present: ADAMS, HUNTER and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States Department of Education and was argued by counsel May 18, 1981. By judgment entered October 13, 1981, the Court granted the petition for review and reversed the order of the said Department, dated May 7, 1980, and remanded the cause for further proceedings. The Supreme Court granted a petition for writ of certiorari and by judgment dated May 31, 1983, reversed the judgment of this Court and remanded for further proceedings in conformity with its opinion. On July 20, 1983, this Court entered an order vacating its judgment entered October 31, 1981. After additional

briefing, the cause was reargued before a different panel October 26, 1983. On consideration whereof, it is now here ordered and adjudged by this Court that the within cause be, and the same, is hereby remanded to the Secretary of Education for further proceedings consistent with the opinion of this Court.

ATTEST:
/S/ SALLY MRVOS
Clerk

DECEMBER 27, 1983

Certified as a true copy and issued in lieu of a formal mandate on February 27, 1984.

Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1991

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION, PETITIONER

v.

SHIRLEY HUFSTEDLER, SECRETARY OF
EDUCATION, ETC., RESPONDENT

SUR PETITION FOR REHEARING BEFORE ORIGINAL PANEL AND REHEARING IN BANC

Present: SWITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*

The petition for rehearing before the original panel and before the court in banc filed by Respondent in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in the circuit in regular active service not having voted for rehearing the petition for rehearing is denied.

By the Court,

/S/ ARLIN M. ADAMS

Circuit Judge

Dated: FEB. 17, 1984

(2)

No. 83-2064

Office - Supreme Court, U.S.
FILED
JUL 26 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

v.

STATE OF NEW JERSEY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

FRED N. FISHMAN
ROBERT H. KAPP
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
BEATRICE ROSENBERG
NORMAN J. CHACHKIN *
RUTH E. GORDON
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CIVIL RIGHTS UNDER LAW
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-2064

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

v.

STATE OF NEW JERSEY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights for all Americans. The Committee has, over the past 21 years, enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The Lawyers' Committee has had a long-standing interest in Title I of the Elementary and Secondary Edu-

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* Letters of the parties consenting to the filing of this brief have been submitted to the Clerk.

cation Act of 1965 because of the statutory emphasis upon meeting the needs of poor and disadvantaged children.[1] In the early 1970's the Committee began to monitor federal administration of the Title I program, in order to determine whether states and local school districts were using their grants to operate projects which carried out this basic purpose. These activities greatly intensified in 1975 with the creation of the Committee's Federal Education Project. One of the Project's major goals was to stimulate adherence to the categorical restrictions of the Title I statute and regulations in order to increase the effectiveness of local compensatory programs. The Project has been an informational resource for parents of Title I participants and Title I staff in local educational agencies, and it provided legal representation to parents of Title I students in litigation and administrative complaint proceedings, including a major supplanting decision, *Alexander v. Califano*, 432 F. Supp. 1182 (N.D. Cal. 1977).[2]

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[1] In 1981 the Title I program was replaced by "Chapter 1" of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, §§ 552 *et seq.*, 95 Stat. 464-69 (codified at 20 U.S.C. §§ 3801 *et seq.* (1982)). Chapter 1 retains the Title I focus upon assisting educationally disadvantaged children residing in high-poverty areas, *see* Pub. L. No. 97-35, § 552, 95 Stat. 464 (codified at 20 U.S.C. § 3801 (1982)), as well as the specific targeting and non-supplanting provisions of the Title I law, *see id.*, §§ 556(b)(1), 558(b), 95 Stat. 466, 468 (codified at 20 U.S.C. §§ 3805(b)(1), 3807(b) (1982)). Hence, the rulings below have continuing importance for the major federal program of aid to elementary and secondary schools.

[2] In 1976, pursuant to a contract with the National Institute of Education, the Lawyers' Committee established a separately staffed unit, the Legal Standards Project, to conduct research on the legal framework of Title I. This project subsequently provided extensive recommendations for legislative changes, many of which were incorporated in the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143. The Congress' reliance upon the work of the Legal Standards Project is acknowledged in the legislative history of the 1978 amendments.

Throughout its involvement with Title I, the Lawyers' Committee has sought to promote vigorous enforcement of the programmatic and fiscal restrictions embodied in the federal statute and regulations. Compliance with these requirements is essential, in our judgment, to insuring the educational effectiveness of compensatory instruction funded by the federal government, However, our experience demonstrates that meaningful compliance depends, in significant part, upon creating the expectation that failure to meet the statutory conditions upon the expenditure of funds will be followed by audit and recoupment of misspent monies.

Thus, the Committee is concerned that the holding below, applying later-enacted statutory provisions to defeat recoupment of funds which were not expended in accordance with the terms contained in a previous grant-in-aid agreement, will have a detrimental impact upon educational opportunities for poor children by weakening the incentive for meticulous adherence to statutory and regulatory requirements. This is particularly the case here, since funds are not unlimited and accurate targeting of programs to serve only eligible schools and attendance areas is central to the functioning of an effective federal compensatory program. The depth of our concern over these matters led us to submit a brief *amicus curiae* when this matter previously came before this Court on the issue of the Secretary of Education's authority to recover misspent funds. *Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312 (1983). Because the ruling by the Third Circuit on remand has an equally devastating potential to impair achievement of basic program goals, and because the Courts of Appeals are being asked with increasing frequency to review final audit determinations of the Department of Education concerning Title I projects, we submit this brief to underscore the important educational, as well as legal, reasons why this Court should again grant review.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case involves the right of the federal government to recover Title I[3] grant monies made available to the State of New Jersey, and by the State to the Newark school district, for the 1970-71 and 1971-72 school years. *New Jersey admits that the funds were expended at ineligible schools rather than in accordance with statutory and regulatory provisions in force when the grants were made.*[4] If the misspent funds are recouped, up to 75% of the amount recovered may be returned to the State for the purpose of supporting additional compensatory programs to assist Newark students who continue to suffer the effects of educational deprivation and disadvantage.[5]

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[3] Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, as renumbered by Pub. L. No. 89-750, § 116, 80 Stat. 1191, 1198, *reprinted in* 1966 U.S. Code Cong. & Ad. News 1392, 1400.

[4] Pet. App. 45a, 46a (citing Transcript of Oral Argument before Education Appeals Board, June 21, 1979, at 26). Briefly, the statute mandated that Title I-funded projects be located to serve "school attendance areas having high concentrations of children from low-income families." 20 U.S.C. § 241e(a)(1)(A) (1970). Regulations and Program Guides issued by the Department of Health, Education and Welfare between 1965 and 1970 defined this term to mean attendance areas with higher-than-average numbers or percentages of children from poor families. *See generally* Joint Appendix at 14-16, *Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312 (1983) (Final Audit Report, New Jersey). The major portion of the audit claim involved in this case results from the improper determination that ten Newark schools met this eligibility standard in the 1971-72 school year.

[5] In the words of the statute, New Jersey would have to spend the returned funds "to the extent possible, for the benefit of the population that was affected by the failure to comply or by the misexpenditures which resulted in the audit exception." *See* 20 U.S.C. § 1234e(a)(2) (1982); Petition for Certiorari, *Secretary of Education v. Kentucky*, No. 83-1798, at 15 n.13.

The Court of Appeals for the Third Circuit rejected recoupment of the monies misspent in 1970-71 and 1971-72 because the challenged expenditures might possibly have been proper if tested according to a school eligibility provision which the Congress added to Title I in 1978.[6] The Court of Appeals reached this result despite the

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[6] Pub. L. No. 95-561, § 101(a), 92 Stat. 2143, 2161-62 (codified at 20 U.S.C. § 2732(a)(1) (1982)). There are two reasons why the expenditures in question might not have been lawful even had they been made after 1978. *First*, as the court below recognized, use of the provision added in 1978 was conditioned upon a special "maintenance of effort" requirement for compensatory programs; since New Jersey had not sought to rely upon the 1978 law prior to review in the Court of Appeals, the record previously made in the administrative proceedings is not adequate to determine whether this condition had been met (*see* Pet. App. 5a). *Second*, the Title I law and regulations always required that projects be of "sufficient size, scope and quality" to offer hope of significant achievement gains for participants. *See* Pub. L. No. 89-10, § 2, 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (current version at 20 U.S.C. § 2734(d) (1982). This requirement usually resulted in a school district's establishing Title I projects at fewer than all eligible schools, in light of limited Congressional appropriations, which never reached the authorization level contained in the statute. Because in this case, the federal auditors determined that the number of eligible schools was itself improperly inflated, they had no occasion to consider whether Newark's Title I program during the years in question otherwise met the "size, scope and quality" requirement. Thus, even if the 1978 amendments' 25%-eligibility provision could be used in Newark, questions about the program's conformity with other statutory and regulatory requirements would remain.

Despite this uncertainty, and despite the possibility that the Secretary may still establish, on the remand ordered below, the government's right to recover the funds sought (even under the Third Circuit's retroactive reading of the 1978 amendments), this matter is ripe for review since the decision below finally—and erroneously—determines that issue of retroactivity. Moreover, the decision will bind the Department of Education in Title I audit cases which are now pending and which may in the future arise from the States within the Third Circuit. *Cf.* Pet. at 16 ($68 million in Title I audit claims pending). These facts underline the necessity for review by this Court now.

fact that the 1978 law specifically provides that "the provisions of this Act and the amendments and repeals made by this Act [7] shall take effect October 1, 1978"; [8] and despite the complete absence—from the statutory language and from the legislative history of the 1978 amendments—of any indication that Congress intended the new eligibility standard to have retrospective effect. Instead, the court below relied upon general statements that the 1978 changes were designed to alter restrictive interpretations of the original statutory language and upon the principle that remedial legislation should be applied retroactively.

This view of the federal government's authority to recapture improperly spent grant-in-aid funds would apply not just to education programs but also to a wide variety of other grant statutes which federal Departments are obligated to audit and enforce.[9] For this reason alone, the case involves "a public matter of great national concern" [10] which should be reviewed by this Court.[11]

Furthermore, the approach taken by the Third Circuit rests upon fundamental legal errors which demand cor-

[7] New Jersey does not contend, and the court below did not hold, that the 1978 amendments explicitly repealed or retrospectively amended the previous eligibility standards which the auditors found to have been violated.

[8] Pub. L. No. 95-561, § 1530, 92 Stat. 2143, 2380, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2143, 2380.

[9] *Cf.* 5 U.S.C. App. (1982) (Inspector General Act of 1978).

[10] Pet. App. 5a [Court of Appeals' ruling].

[11] Similarly, the Sixth Circuit's decision in *Kentucky Department of Education v. Secretary*, 717 F.2d 943 (1983), *petition for cert. filed*, 52 U.S.L.W. 3845 (May 3, 1984), adopts a rule of construction which will have serious consequences for all grant programs, and especially for compensatory education efforts under Title I or Chapter 1. *See infra* note 25. We submit that review should be granted in both matters and argument in tandem scheduled.

rection by this Court. As the government persuasively demonstrates, the Court of Appeals confused two basic and well-settled rules of statutory construction that, absent clear legislative intent to the contrary, govern retroactivity: (1) substantive legislation applies only prospectively; [12] and (2) remedial or procedural enactments are given retrospective application in suits filed prior to, but still pending after, their passage unless substantive rights would thereby be affected or injustice would result.[13] *See* Pet. at 8-15. Moreover, the ruling below violates simple principles of contract which apply to grant-in-aid programs. As this Court recognized only last Term in its prior decision in this case, New Jersey "chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I.[14] . . . [If] the State failed to fulfill those assurances, . . . it therefore became liable for the funds misused, as the grant specified . . . funds that it accepted under admittedly valid conditions with which it failed to comply." *Bell v. New Jersey*, 76 L.Ed 2d at 326-27; *see also, id.* at 329 (White, J., concurring).[15]

The government's right to recover funds not expended in accordance with the specified conditions is thus a contract right, and subsequent legislation is relevant only insofar as it unambiguously represents a waiver of the

[12] *E.g., United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982).

[13] *E.g., Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312, 318 n.3 (1983); *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974). Actually, the Court of Appeals discussed only this second principle, while ignoring the first.

[14] *See* Pet. App. 40a.

[15] *Cf. Heckler v. Community Health Services of Crawford County, Inc.*, 52 U.S.L.W. 4621 (U.S. May 21, 1984).

contractual conditions.[16] For example, enactment of a bill directing the Secretary of Education not to seek to recover misexpenditures identified in audits completed prior to a specified date would have constituted a waiver.[17] Similarly, the 5-year "statute of limitations" on repayment of misexpenditures of Title I funds[18] is such a waiver under the circumstances specified in the statute. Absent such a waiver, there is no basis for modifying the contractual understanding between the parties by virtue of a subsequent enactment applying to future grants. This amounts to rewriting the contract to the detriment of the Department of Education and

[16] As the government's petition demonstrates, nothing in the language or the legislative history of the 1978 amendments to Title I indicates Congress' intent to waive federal rights under the earlier grant agreements. *See* Pet. at 9-11. This Court has repeatedly emphasized that repeals by implication are not favored. *E.g., Kremer v. Chemical Construction Company*, 456 U.S. 461, 468-78 (1982).

[17] Such measures were considered by the Congress in 1980 and 1981. A subcommittee of the House of Representatives held hearings on one bill, *Dismissing Certain Cases Pending Before the Education Appeal Board: Hearings on H.R. 8145 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Educ. & Labor*, 96th Cong., 2d Sess. (1980), but it was never reported out. A floor amendment with the same effect was defeated in the Senate on a point of order. 127 Cong. Rec. S5427-30, 5442 (daily ed., May 21, 1981).

[18] 20 U.S.C. § 884 (Supp. IV 1974), as added by Pub. L. No. 93-380, § 106, 88 Stat. 484, 512, *reprinted in* 1974 U.S. Code Cong. & Ad. News 541, 576, provided that:

> No state or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of this Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized.

See also H.R. Rep. No. 805, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4093, 4160. The currently applicable version of this provision is codified at 20 U.S.C. § 1234a(g) (1982).

that of the program beneficiaries, who relied on the assurances which New Jersey submitted to expend Title I funds only in accordance with the statutory and regulatory criteria.

This Court has held that the States can be deemed accountable to comply with only those federal funding conditions which were clearly explicated at the time a grant was accepted. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). The corollary of this principle is that, where the terms of the agreement were clear and the fact of their violation is admitted, as in this case, the States can and should be held accountable to make repayments.

Review in this case is particularly warranted because the substantive requirement at issue—the determination of school and attendance area eligibility—is of central importance to the integrity and effectiveness of federal compensatory education programs,[19] which constitute the largest part of federal aid to elementary and secondary education. While it would be highly desirable to assist all children in need of services, limited funding has made this impossible. Expenditures must be targeted on discrete populations. Hence, the statute provides that appropriations are to be allocated among States and school districts according to the number of children from low-income families,[20] and that funds are granted only for programs which contribute to meeting the needs of educationally deprived children *in areas within school districts where there are large concentrations of children from such families.*[21]

[19] This remains true under Chapter 1, as it was under Title I. *See supra* note 1.

[20] *See* 20 U.S.C. § 241c(2) (Supp. IV 1968) [Title I]; 20 U.S.C. § 2711(c) (1982) [same]; 20 U.S.C. § 3803 (1982) [Chapter 1].

[21] 20 U.S.C. § 2732 (1982) [Title I]; 20 U.S.C. § 3805(b)(1)(A) (1982) [Chapter 1]. *See Alexander v. Califano*, 432 F. Supp. 1182,

The project area eligibility standards are linked to the additional requirement, which has been maintained throughout all versions of the statute since it was first passed in 1965, that programs must be "of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting" "the special educational needs of educationally deprived children in" project areas.[22] The purpose of this provision is to avoid dissipation of federal grants by spreading them among too many underfunded projects in too many different schools. Because local school administrators are almost always under intense pressure to serve as many students as possible,[23] the threshold determination of eligible school attendance areas facilitates compliance with the "size, scope and quality" requirement.[24] It is, for this reason,

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1189 (N.D. Cal. 1977) (referring to "the legislative choice to concentrate rather than spread aid among educationally deprived children"). Once eligible project areas are selected, every child determined to be educationally deprived, regardless of economic status, is eligible to receive services. Educational deprivation is the sole criterion for deciding which children in a project area will participate in these federal programs.

[22] Pub. L. No. 89-10, § 205(a)(1), 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (codified at 20 U.S.C. § 241e(a)(1) (Supp. IV 1968)) [Title I]; *see* 20 U.S.C. § 3805(b)(3) (1982) [Chapter 1].

[23] *See* Joint Appendix at 176, *Bell v. New Jersey* (New Jersey Department of Education's Application for Review of Final Audit Determination) ("LEA had no choice but to assume high concentrations of low-income families in all attendance areas and to attempt to spread the benefits of Title I as broadly as possible to assure that most educationally deprived children would be served").

[24] *See id.* at 34 (Final Audit Report, New Jersey) ("We do not question SDE's assertion that during the period covered by our audit poverty was widespread in the district. This incidence of poverty therefore necessitated closer attention to the calculation of low-income percentages to insure use of Title I funds in eligible low-income attendance areas with the greatest concentrations of educationally disadvantaged children.")

critical to the operation of successful compensatory programs.[25]

New Jersey's approval of the Newark school district's application to provide programs at ten eligible schools thus was no mere technical violation. Rather, it diluted the funds, and thereby the programs, available to participating students. The audit and recoupment process allows the federal government to seek to rectify this error, and the 75%-payback provision, *see supra* note 5 and accompanying text, provides a mechanism for using the process to aid the Title I students harmed by the misexpenditures. From an educational standpoint, therefore, it is a matter of great significance whether the process will go forward or whether New Jersey will be permitted to escape any obligation either to repay the funds or to increase its remedial efforts. Since there is

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[25] Similarly, the "supplanting" violation at issue in *Secretary of Education v. Kentucky*, *supra* note 5, involves another of the most fundamental aspects of federal compensatory efforts: the provision of extra resources for the education of participating children, above and beyond what they would otherwise receive from state and local sources. In that case, in 1974, fifty school districts in Kentucky used Title I funds to support entirely separate "readiness" classes for participating children, who were removed from their regular first- or second-grade classes. Even though these students were promoted at the end of the year to the next grade, they did not receive the benefit of any expenditure of state and local funds for their education in required subjects such as language arts, mathematics, etc. The Secretary of Education sustained audit findings that this arrangement constituted "supplanting" in violation of the requirement of the law that "Federal funds . . . will be so used (i) as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating [in the Federal program]." Although Kentucky argued that it had not reduced the number of teachers or level of expenditures in schools which had Title I readiness classes, this merely compounded the supplanting—since a small number of nonparticipating students received the increased benefits of that State and local funding, while Title I students received none.

no persuasive indication that Congress intended, by its subsequent change in the law, to alter that obligation, the decision below makes not only bad law but also bad educational policy.

As this Court is well aware, the statutory framework of federal grant programs rarely remains completely unchanged; rather, successive Congresses often amend and re-amend an enactment in the light of experience and perceptions. Indeed, State and local grantees are among the most fervent supporters of this "fine tuning."[26] For this reason, if the decision below is permitted to stand, federal grantees subject to audit exceptions can be expected to seek repeated statutory changes that would make their past non-compliance with program requirements conform to the law. The incentive to maintain compliance with statutory and regulatory provisions will be substantially diminished; federal program beneficiaries—in this case, educationally disadvantaged children who most need assistance—will be the losers. Rather than permit such a result, this Court should review this

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[26] *See, e.g., Oversight Hearing on Amendments to Title I of ESEA and GEPA: Hearings Before the Subcommittee on Elementary, Secondary and Vocational Education, House Comm. on Educ. & Labor*, 96th Cong., 1st Sess. 26-32 (1979) (testimony of New York City Chancellor Macchiarola supporting amendment to drop matching funds requirement for schoolwide projects); *Education Amendments of 1977: Hearings on S. 1753 Before the Subcommittee on Education, Arts and Humanities of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 1554-58 (1977) (statement of Conrad Ott, Superintendent of Akron public schools, requesting amendment to permit continuing services to students formerly attending Title I-eligible schools which were closed); *id.* at 1397-99 (statement of Pennsylvania Secretary of Education Caryl M. Kline, proposing modification of supplanting provision); *Elementary and Secondary Education Amendments of 1973: Hearings on H.R. 16, H.R. 69, H.R. 5163, and H.R. 5823 Before the General Subcommittee on Education, House Comm. on Educ. & Labor*, 93rd Cong., 1st Sess. 419 (1973) (testimony of Chicago Assistant Superintendent James Moffat, seeking elimination of annual school eligibility requirement).

case and hold grantees to repayment in the absence of clear legislative direction to the contrary.

Based upon nearly a decade of experience with the Title I and Chapter 1 programs, including extensive interchange with State and local school personnel and litigation involving Title I claims, the Lawyers' Committee is convinced that the audit process does not impose unjustified burdens upon school officials based upon technical or complex statutory or regulatory requirements. In this case, for example, the Newark school system apparently had little difficulty in correctly identifying eligible schools in the school year following those for which the auditors noted misexpenditures.[27] Throughout the history of Title I, most States and school districts have not only conformed their programs to the legal requirements, but many have also repaid audit exceptions when mistakes were identified.[28] Thus, the result reached below is unfair, both to States which have not violated program restrictions and also to States which made errors, recognized their accountability, and voluntarily paid their debts. It is also unfair to the interests of Newark's Title I children, which will be doubly impaired: once when funds were diverted from those the program was intended to help, and again when these funds are not recovered. The rights of these program beneficiaries should be vindicated by repayment of the misspent funds, especially since, under the 75% payback provision, most of this money can then be directed to those for whom it was originally intended—educationally deprived children.

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[27] *See* Joint Appendix at 26, *Bell v. New Jersey* (Final Audit Report, New Jersey).

[28] *See, e.g., Dismissing Certain Cases Pending Before the Education Appeals Board: Hearings on H.R. 8145 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Education & Labor*, 96th Cong., 2d Sess. 392 (1980) (Prepared Statement of Hayes Mizell, Chairman, National Advisory Council on the Education of Disadvantaged Children).

CONCLUSION

For the foregoing reasons, *amicus* urges that the Petition for Certiorari be granted.[29]

Respectfully submitted,

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[29] As previously noted, we also urge the Court to grant review in the similar case of *Secretary of Education v. Kentucky* because the ruling in that case, too, both involves a critical element of federal education programs and also improperly limits the recoupment authority of the Secretary of Education. *See supra* notes 11, 25.

NO. 83-2064

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Counter-Statement of the Question Presented

Whether the 25% eligibility standard, enacted as part of the 1978 Amendments to the Elementary and Secondary Education Act of 1965 to correct the aberrant Title I regulation which denied disadvantaged children the benefits of Title I programs simply because their attendance areas were within school districts with extremely high levels of poverty, should be applied to the Newark audit wherein the federal auditors, applying the discredited Title I regulation, had declared ten attendance areas ineligible for receipt of Title I moneys even though those areas had concentrations of poverty ranging from 27.9% to 33.5%.

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NO. 83-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

The Respondent, State of New Jersey, Department of Education, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the opinion of the United States Court of Appeals for the Third Circuit reported at 724 F.2d 34.

Counter-Statement of the Case

This case involves the federal audit of the Newark Title I program for the period from September 1, 1970 through August 31, 1973. The audit had, as its primary focus, the Title I program implemented in Newark during the 1971-72 fiscal year. The federal auditors found that the Newark school district had correctly calculated its district-wide low-income percentage and, therefore, had received the correct amount of Title I moneys *in toto* for that year (PNJa12).[1] Furthermore, the auditors did not question the eligibility of the poor and disadvantaged children who had benefited from the Title I programs nor did they challenge the adequacy of the supplemental education programs offered by the district to these eligible children. Finally, there was not even a suggestion in the audit that the federal Title I moneys had been used to supplant rather than supplement the State and local educational effort. Rather, the auditors' sole concern was whether the Newark school district, for the 1971-72 fiscal year, had properly allocated its Title I moneys among its various attendance areas. It is this narrow eligibility issue which was decided by the Third Circuit, in its opinion below, and which the Secretary requests this Court to review.

Title I of the Elementary and Secondary Education Act of 1965 was intended to provide financial assistance in "areas with concentrations of children from low-income families to expand and improve their educational programs by various means which contribute particularly to meeting the special educational needs of educationally

[1] PNJa— refers to the Appendix submitted on behalf of the State of New Jersey, Department of Education, in the Court of Appeals for the Third Circuit.

deprived children." 20 U.S.C. §241a. The statutory eligibility standard, at the time of the Newark audit, provided that Title I funds should be used for projects designed to meet the particular educational needs of disadvantaged children living in "school attendance areas having *high concentrations* of children from low-income families." (emphasis added) 20 U.S.C. §241e(a)(1). This broad eligibility standard was interpreted by §116.17(d)(2) of the Title I regulations as including attendance areas in which the percentage of children from low-income families was equal to, or greater than, the percentage of such children in the entire school district. 45 C.F.R. §116.17(d) (1972). Therefore, pursuant to this Title I regulation, if the district-wide percentage of children from low-income families was 10%, any attendance area where the incidence of poverty was at, or in excess of, 10% would be eligible for receipt of Title I funds.[2]

The Newark Title I application for the 1971-72 fiscal year showed that *33.9%* of the children in the Newark school district were from low-income families (PNJa290). The narrative portion of the 1971-72 application also demonstrated that Newark was uniformly disadvantaged in other ways. Statistics showed a jobless rate in 1970 of 14%, a rate double that needed to qualify under the Economic Development Act at that time. Another 35,000 residents were earning $3,000 per year or less. In 1971, the Model Cities program in Newark was expanded to include the entire city. At the time the 1971-1972 proposal was submitted, Newark had a black population of 54.2% with another 11% of its population of Hispanic

[2] The Title I regulations also permitted an entire school district to be designated as eligible if there was no wide variance in the number or percentage of children from low-income families within the district. 45 *C.F.R.* §116.17(d).

background. The City also had the highest percentage of slum housing in the nation, the highest incidence of crime, and the second highest birthrate. Of particular significance to the Title I program, and exacerbating the inherent difficulties of obtaining precise statistics of Newark's low-income population, was the fact that in 1970-71, Newark had the highest population turnover in the nation. Indeed, Model Cities data indicated that mobility rates reached as high as 80% for schools in the Newark Title I area (PNJa298).

An acceptable data source for determining Title I eligibility were AFDC statistics. *ESEA Title I Program Guide # 44* (March 18, 1968) (PNJa223). However, at the time the 1971-72 application was prepared, the Newark Board of Education did not have available to it complete AFDC statistics. It, therefore, had to employ an alternate method to determine eligibility utilizing the statistical data then available. It was a methodology which was recognized by the federal auditors as a reasonable alternative for measuring eligibility of school attendance areas under Newark's unique circumstances (PNJa13). *Cf. ESEA Title I Program Guide #44* (PNJa223).

Analyzing Newark's application of this alternative method, the federal auditors found that Newark had correctly used it to calculate its district-wide low-income percentage. However, in determining the Title I eligibility of its attendance areas, Newark had compared (1) the number of AFDC children residing in each attendance area and actually attending public schools with (2) the total number of children residing within each area and attending the public elementary schools. The auditors found this formula unacceptable since there was not a direct relationship between the component elements. They replaced the Newark formula with one which eliminated the AFDC children enrolled in secondary schools from the comparison. By applying their revised formula, the auditors found thirteen (13) schools ineligible for Title I funds in the 1971-72 fiscal years. These schools had, according to the federal recalculations, low-income percentages ranging from 13% to 33.5% (PNJa15, PNJa 17, PNJa18).[3] The auditors found, however, that the practices employed by Newark to determine Title I eligibility were corrected by 1972-73, the third and final year covered by the audit. Indeed, the auditors concluded that:

> . . . the low-income percentages computed for school year 1972-73 were proper and were based on more precise information. The Essex County Welfare Board had furnished BOE [Newark] with a list showing the name and address of each child, ages 5-17, in the ADC category. BOE [Newark] converted this data into attendance area statistics. *Thus, BOE [Newark] had available for the first time statistics indicating the total number of children from low-income families residing in the school attendance area, inclusive of drop-outs and attendees at public, non-public and special education schools.* (Emphasis added) (PNJa19).

There were, therefore, no audit exceptions for 1972-73, the final year of the Newark audit (PNJa6). On the basis of their report, the auditors concluded that New

[3] In addition to this error which occurred only in 1971-72, the federal auditors determined that $132,287 in Title I funds had been used during 1970-71 in schools which they concluded did not meet the eligibility requirements of the Title I regulations.

Jersey should return $1,161,917 to the Office of Education.

On October 21, 1976, the State of New Jersey requested a review of the final audit determination of the Newark Title I program, thereby commencing an administrative proceeding which was to continue until 1980. New Jersey argued throughout this proceeding that the attendance areas declared ineligible by the federal auditors were, in fact, eligible for Title I assistance.[4] In support of this position, the State submitted recalculations of Title I eligibility. In these recalculations, the State measured eligibility by comparing the total number of AFDC children from each attendance area enrolled in public elementary and secondary schools with the total number of children enrolled in public elementary and secondary schools (PNJa245 to PNJa247). According to the State's recalculations, all but two of Newark's attendance areas had low-income percentages in excess of the district-wide average of 33.9% and would, therefore, be eligible for receipt of Title I funds. The formula employed by New Jersey responded to the federal auditors' criticism of the Newark methodology since the component elements were directly related. More importantly, unlike the federal recalculations, it did not remove AFDC children in secondary schools from the formula; rather, it simply added all children in public secondary schools

[4] It is incorrectly asserted by *amicus*, Lawyers' Committee for Civil Rights under Law, that New Jersey "admits that the funds were expended at ineligible schools." *Amicus* brief at 4. Nothing could be wider of the mark. Although New Jersey acknowledged before the Education Appeal Board that Newark had applied a "flawed" formula to determine eligibility of school attendance areas, New Jersey has consistently maintained throughout this protracted litigation that those attendance areas were indeed eligible to receive Title I funds. Pet. App. 35a to 36a, 49a to 56a; PNJa55, PNJa69 PNJa74 to PNJa77.

to the comparison. The State's recalculations, therefore, more accurately reflected the number of low-income children attending public schools in the various attendance areas than did those of the federal auditors.

In the alternative, New Jersey argued that the whole of the Newark school district, which had a district-wide low-income percentage of 33.9%, qualified for designation as a Title I area under regulations applicable in 1971 and in accordance with the clearly expressed intent of Congress (PNJa64 to PNJa65).

In addition to these substantive challenges to the validity of the final audit determination, New Jersey argued that the United States Department of Education was without statutory authorization to order the State to repay moneys received under Title I grants in the 1970-71 and 1971-72 school years.

The Education Appeal Board rejected both the jurisdictional and substantive arguments advanced by New Jersey and demanded that the State repay $1,031,394 to the United States Office of Education.[5] By letter dated May 7, 1980, New Jersey was advised that the Panel's Decision was the final decision of the United States Department of Education.

A Petition for Review of the decision of the Secretary of Education was filed with the United States Court of Appeals for the Third Circuit pursuant to 20 U.S.C. §2851. In it, New Jersey once again advanced both its substantive and jurisdictional arguments. In an opinion issued on October 13, 1981, the Third Circuit granted

[5] The only difference between this sum and the repayment demanded in 1976 was $130,613, an amount barred by operation of the applicable statute of limitations. 20 U.S.C. §884 (1976) (PNJa 403).

the Petition of Review, reversed the order of the Department of Education and remanded with instructions "to vacate the orders requiring a repayment by petitioners of previously received Title I funds." *State of New Jersey, Dept. of Education* v. *Hufstedler,* 662 F.2d 208, 219 (3rd Cir. 1981). Since the Third Circuit concluded that the Department of Education was without authority to issue the Order before it, the substantive challenges advanced by New Jersey to the correctness of the audit determination were not reached.

This Court granted *certiorari* and reversed, concluding that the pre-1978 version of the Elementary and Secondary Education Act contemplated that states misusing federal funds would incur a debt to the Federal Government for the amount misused. *Bell* v. *New Jersey,* —— U.S. ——, 103 S.Ct. 2187, 76 L.Ed.2d 312 (1983). The Court also found that the Secretary had followed the proper procedures in administratively determining the amount owed by the states to the Federal Government. However,

> [w]hether that determination is supported by substantial evidence and by application of the proper legal standards is a question for the courts, if the affected parties seek judicial review. Here, New Jersey and Pennsylvania sought that review, and we remand to the Court of Appeals to permit it to undertake to review the challenges raised by each State to the Secretary's determination.[6] *Bell* v. *New Jersey, supra,* 103 S.Ct. at 2198, 76 L.Ed.2d at 328.

[6] Upon remand, the Third Circuit designated one of its judges to hold conferences with the respective parties in order to determine whether the matters could be settled. Although the Pennsylvania case settled, efforts to resolve the New Jersey matter failed. An Order was thereafter issued on September 27, 1983 directing the parties in the New Jersey case to file supplemental briefs.

Furthermore, the Supreme Court having only decided that states can be held liable for the misuse of funds, left

> . . . for the Court of Appeals on remand the question of whether the substantive standards of the ECIA or the 1978 amendments can apply to grants approved and paid under the pre-1978 ESEA. *Bell* v. *New Jersey, supra,* 103 S.Ct. at 2192, 76 L.Ed. 2d at 321.

In his concurring opinion, Justice White further noted

> . . . these cases do not involve any question as to the substantive standard by which a claim that a recipient has violated its Title I commitments is to be judged. Rather, they concern the abstract question whether the Secretary has the right to recover Title I funds under any circumstances. In my view, *there is a significant issue whether a State can be required to repay if it has committed no more than a technical violation of the agreement* or if the claim of violation rests on a new regulation or construction of the statute issued after the State entered the program and had its plan approved. *Bell* v. *New Jersey, supra,* 103 S.Ct. at 2199, 76 L.Ed.2d at 329 (emphasis added).

Upon remand, the Third Circuit decided the issue left to it by this Court, *i.e.* whether the substantive standards of the 1978 Amendments apply to the Newark Title I program. It did so, however, in a particularly restrictive fashion. The court found initially that the eligibility standards contained in the Title I regulation, 45 C.F.R. §116.17(d) (1972), worked an "injustice . . . on areas with high concentrations of low income families." *State of New Jersey, Dept. of Education* v. *Hufstedler,* 724 F.2d 34, 36 (3rd Cir. 1983). It found that Congress had enacted, as part of the 1978 Amendments to the ESEA,

a 25% eligibility standard to remedy these inequities. 20 U.S.C. 2732 (a)(1). This standard allows local educational agencies to declare school attendance areas eligible for Title I funds if at least 25% of the children in that area are from low-income families and if certain conditions are met. The court found that the 25% standard was included in the 1978 Amendments "to correct regulations that frustrated the basic objectives of the Title I program." *Id.* at 36-37. Since the Secretary's application of the overruled Title I regulation to Newark continued precisely the same injustices as Congress sought to correct by enacting the 25% standard, the Third Circuit concluded that the eligibility of Newark's school attendance areas should be measured by that corrective standard.[7] The court below observed, however:

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[7] The calculations of the federal auditors show that the following Newark attendance areas had an incidence of poverty during the 1971-72 fiscal year in excess of 25%:

School Attendance Areas	Low-Income Percentages as Recomputed by Federal Auditors	Title I Expenditures Disallowed by Federal Auditors
South 17th Street	33.5%	$104,842
Franklin	32.4	115,227
Clinton Jr. High	32.1	58,214
Waverly Avenue	31.9	56,665
Newton Street	31.5	69,463
Hawkins	30.3	102,803
Burnet Street	30.2	56,007
Central Avenue	29.4	61,532
Madison	28.8	103,750
Weequahic High	27.9	53,284

(PNJa15, PNJa17, PNJa18).

(Footnote continued on following page)

Our decision today, unfortunately, will not bring this protracted controversy to an end. While the record does indicate that several of the school attendance areas in question had low-income percentages in excess of 25 percent, these areas could qualify for Title I funds in any given year under the newer legislation, only if the total amount of funds expended under Title I and similar State programs equaled or exceeded the total amount expended from the combined sources in the preceding year. 20 U.S.C. §2732(a)(1) (Supp. V. 1981). Since the record before us does not allow for such a calculation, the Secretary of Education will be required to make this determination for each school attendance area that had a Title I project in the relevant years. *State of New Jersey, Dept. of Education* v. *Hufstedler, supra,* 724 F.2d at 37.

The matter was therefore remanded to the Secretary for further proceedings.[8]

A Petition for Rehearing was denied by the Third Circuit in an Order entered on February 7, 1984. The Secretary, on June 15, 1984, filed the instant Petition for a Writ of Certiorari.

(Footnote continued from preceding page)

Should it be determined that the Newark Title I program met the conditions necessary to apply the 25% standard, the above Title I expenditures totalling *$781,787,* would be allowed. However, disallowances for expenditures made in attendance areas with an incidence of poverty below 25% would be sustained. These disallowances total *$247,843.*

[8] Following the decision of the Third Circuit, the State Department of Education and the Newark Board of Education have engaged in a joint effort to assure that information and material necessary to demonstrate compliance with 20 U.S.C. §2732(a)(1) is provided the Secretary upon remand. The Secretary, however, has not acted to reopen the administrative proceeding before him.

ARGUMENT

The Court should not grant a writ of *certiorari* because the decision of the Third Circuit to apply the corrective eligibility standard, enacted by Congress as part of the 1978 Amendments to the ESEA, to the Newark Title I program was entirely consistent with sound judicial precedent and neither creates a conflict among the circuits on this narrow issue nor presents any novel or unique circumstances warranting review.

Throughout this protracted litigation, New Jersey has maintained that the provision of Title I programs to disadvantaged children living in school attendance areas in Newark where the percentage of children from low-income families was in excess of 25% and 30% comported with the eligibility standard contained in the Elementary and Secondary Education Act. That broad standard simply provided that Title I funds should be used for projects designed to meet the special educational needs of educationally deprived children in "school attendance areas *having high concentrations* of children from low-income families." (Emphasis added) 20 U.S.C. §241e(a) (1). The statutory language strongly supports the State's position that an objective, rather than a comparative, standard of eligibility was intended by Congress.

The Secretary, however, has argued that the widespread poverty in Newark required it to use "Title I funds in eligible low-income attendance areas with the *greatest concentrations* of educationally disadvantaged children" (PNJa27). To support this position, the Secretary points not to the language of the statute, but to that of a Title I regulation which, *inter alia*, defined an eligible school attendance area as one having a percentage of children from low-income families *equal to, or greater than,* that of the district-wide percentage. 45 C.F.R. §116.17(d) (1972). Application of this regulation led to the anomalous situation wherein eligible poor children were denied the benefits of compensatory education programs solely because they lived in school districts with exceptionally high levels of poverty. According to this regulation, a disadvantaged child living in Newark in a school attendance area with a 33.5% incidence of poverty would be deprived of Title I benefits because Newark's district-wide low-income percentage was 33.9%. However, a similar child, residing in a relatively affluent school district with a low-income percentage of 10%, would be provided a supplemental education program.

To reform this glaring defect in the Title I program, Congress enacted, as part of the 1978 Amendments to the ESEA, a 25% eligibility standard. 20 U.S.C. §2732 (a)(1). Pursuant to this standard, attendance areas with an incidence of poverty in excess of 25% could qualify for Title I funds without reference to the district-wide level of poverty. The Third Circuit, therefore, confronted the issue of whether the eligibility of the Newark attendance areas should be measured by the Title I regulation or by the corrective eligibility standard included in the 1978 Amendments to the ESEA. The court concluded that the Title I regulation frustrated the objectives of the Title I program and that the 25% eligibility standard contained in the 1978 Amendments was intended by Congress to reform that discordant agency rule. Rather than apply the disapproved rule and continue the inequities Congress sought to eliminate, the Third Circuit determined to measure the eligibility of the attendance areas in the Newark Title I program by the 25% standard contained in the 1978 Amendments

to the ESEA. In so holding, the Third Circuit acted in accord with sound judicial precedent.

It is a basic tenet of American jurisprudence that a court is to apply the law in effect at the time of decision unless manifest injustice would result from doing so or there is statutory direction or legislative history to the contrary. *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). Although *Bradley* provides the clearest statement of this rule, it has its origin in *United States* v. *Schooner Peggy,* 1 Cranch, 103, 2 L.Ed. 49 (1801), which succinctly explains:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside. *Schooner Peggy, supra,* 1 Cranch at 110, 2 L.Ed. at 51 (footnote omitted).

Courts have routinely adhered to the principle articulated in *Schooner Peggy,* applying the law as they have found it at the time of decision even though the law may have

changed by virtue of constitutional amendment, *United States* v. *Chambers,* 291 U.S. 217, 54 S.Ct. 434, 78 L.Ed. 763 (1934) (Twenty-first Amendment passed, prosecution dismissed); intervening statute, *Ziffrin, Inc.* v. *United States,* 318 U.S. 73, 63 S.Ct. 465, 87 L.Ed. 621 (1943) (Principle applied to intervening change in *state* law), *Carpenter* v. *Wabash Ry. Co.,* 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940) (Principle applied to intervening change in *federal* law) or judicial decision, *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941); *Hamling* v. *United States,* 418 U.S. 87, 102, 94 S.Ct. 2887, 2899-2900, 41 L.Ed.2d 590 (1974), reh. den. 419 U.S. 885 (1974).

This principle has been applied to give retroactive application to both procedural and substantive changes in the law. Illustrative of the latter is the decision of the Court in *Carpenter* v. *Wabash Ry. Co., supra,* where a plaintiff had moved to dissolve an equity receivership of a railroad because of, *inter alia,* an alleged error in the appointed master's ruling that his personal injury judgment was an unsecured claim against the railroad. While a petition for writ of *certiorari* was pending, Congress passed an amendment to the bankruptcy act wherein pending equity receiverships were to recognize claims based on personal injury judgments as preferred and were to pay such claims out of the railroad's assets as operating expenses. The Court, relying on its decision in *Schooner Peggy,* applied the law at the time of decision. In *Thompson* v. *Sawyer,* 678 F.2d 257 (D.C. Cir. 1982), female bindery workers at the Government Printing Office brought a sex discrimination suit. Relief was sought under the Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act, 29 U.S.C. §206(d) (1976), and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1976). While the mat-

ter was pending in the district court, the definition of employer under the Fair Labor Standards Act was amended to include public employers. Citing the *Bradley* analysis, the Court of Appeals for the District of Columbia Circuit upheld the district court's decision that the defendants were retroactively liable for damages under the Fair Labor Standards Act Amendments of 1974. *Id.* at 279-281. *See also Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486, n. 16, 101 S.Ct. 2870, 2879, 69 L.Ed. 2d 784 (1981) (Law affecting damages applied retroactively in private suit even though no issues of great national concern involved); *Payne* v. *Panama Canal Co.*, 607 F.2d 155 (5th Cir. 1979) (*Thorpe* [*see infra*] and *Bradley* held to require retroactive application of the 1975 and 1978 Amendments to the Back Pay Act to pending action in the computation of damages.)

The decision in *Schooner Peggy* did not make clear, however, whether a change in the law while a case was pending was to be given effect only where the law, by its own terms, was to apply to pending cases, as was true in *Schooner Peggy*, or whether the change in the law must be given effect unless it was clear from the law that it was not to apply in pending cases. This question was answered definitively in *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969), where the Court broadly interpreted the *Schooner Peggy* decision to apply in all situations where there is a change in the law and not just when the law by its own terms demands application in a pending case. *Thorpe, supra*, 373 U.S. at 282, 89 S. Ct. at 526. The Court further stated that the presumption is to apply a change in the law in a pending case unless there is a clear indication that it was not meant to apply to pending cases. *Ibid.*

A review of the 1978 Amendments to the ESEA, including the corrective eligibility standard here under consideration, discloses no positive statutory direction against their retroactive application.[9] The legislative history of

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[9] 20 U.S.C. §2702, which the Secretary asserts establishes the prospective nature of the 1978 Amendments, clearly does not constitute a positive direction against their retroactive application; at best, it is simply a neutral statement, neither affirming nor denying the application of the corrective provisions of the 1978 Amendments to earlier grants. The Secretary's further attempt to use the general savings statute, 1 U.S.C. §109, to establish the prospectivity of the 25% eligibility standard is similarly unpersuasive. The general savings clause provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any . . . liability *incurred under such statute* . . . ." Since the purported liability on the part of New Jersey did not incur under any prior statute, but rather under deficient regulatory standards which were subsequently corrected by Congressional action, 1 U.S.C. §109 is inapplicable. Congress was free to enact the general savings clause to include within its purview ". . . liability incurred under such statute or under regulations or orders promulgated therefrom." Since the provision is specifically limited to liability incurring under a statute, it should not be extended to apply to the present case. Indeed, it has been specifically held that 1 U.S.C. §109, as a provision differing from that of the common law, "must be strictly construed and limited to repealed statutes" and not to the revocation of regulations promulgated by an administrator under legislative authority. *Rodgers* v. *United States*, 158 F.2d 835 (6th Cir. 1947), rev'd on other grounds, 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947). Although in the present situation, unlike *Rodgers*, Congress did amend the ESEA, these amendments, particularly the 25% eligibility standard, did not reflect a change in the mind of Congress regarding the direction of the Title I program as set forth in the prior statutory provision. Rather, the legislative objective was to correct regulations promulgated pursuant to the ESEA which actually thwarted the objectives of the Title I program. Thus, the ultimate effect of the subsequent Congressional action was not to repeal a statutory provision but to

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the Amendments, however, does contain positive evidence that their purpose was to refocus the Title I program so that it would achieve its basic objective of providing educational programs to meet the special needs of children from low-income families living within areas of high concentrations of poverty. Indeed, the extensive hearings conducted by the Subcommittee on Elementary, Secondary and Vocational Education prior to the enactment of the 1978 Amendments are particularly illuminating with regard to the eligibility issue before this Court. During the hearings, the House Subcommittee heard many complaints which centered upon the inequity of the Title I requirements which resulted in schools in needy urban areas being regarded as ineligible. *Elementary and Secondary Education: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, Part 18: Administration of Title I of ESEA* at 102; *Part 21: The Administration's Proposal for Elementary and Secondary Education* at 635, 95th Cong., 1st Sess. (1977). This anomaly in the Title I system resulted, in major part, from "federal regulations which compel the exclusion of large numbers of disadvantaged children as well as large numbers of schools with high concentrations of disadvantaged children." *Education Amendments of 1977: Hearings on S.1753 Before the Subcomm. on Education, Arts and the Humanities of the*

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disapprove an administrative regulation. Indeed, the legislative history reveals continued support for the originally stated purpose of Title I to direct payments under the program to "educationally deprived children in school attendance areas having high concentrations of children from low-income families. . . ." 20 U.S.C. §241e(a)(1). Since the impact of the 25% eligibility standard enacted as part of the 1978 Amendments is on regulations, the general savings clause, codified in 1 U.S.C. §109, does not apply.

Senate Comm. on Human Resources, Part 1, 95th Cong., 1st Sess. 92 (1978). The anomaly created by the federal regulations was aptly summarized by a witness before the Senate Subcommittee:

> Essentially a poor child in a relatively affluent district has a better chance of being in a target school and of getting services under Title I than does a similar child in a district with a high percentage of disadvantaged students. *Id.* at 93. *See also Elementary and Secondary Hearings on H.R. 15, supra, Part 12: National Organizations* at 258-259.

This dissatisfaction with the federal administration of the Title I eligibility standards was echoed by Mrs. Ruth Mancuso, testifying on behalf of the National Association of State Boards of Education:

> We have surveyed several states on a pilot basis and use Maryland as an example since information is fairly easy to obtain with its relatively few county districts (Exhibit C). In Baltimore City any school which has less than 30.3% Title I children was not eligible to receive Title I funds. This minimum is higher than the maximum incidence in schools receiving Title I funds in 11 other counties. This means there are schools in relatively affluent counties receiving Title I assistance with no more than 5% Title I children while schools in Baltimore City with 25-30% Title I children are excluded from the program. *Id.* at 392.

Distress over the inequitable situation where poor children attending schools in primarily decaying urban centers and isolated rural areas were denied the educational benefits of Title I programs was reflected in the House Report:

. . . current OE regulations [45 C.F.R. §116a20(b)(2)][10] provide that any school attendance area with 30 percent or more children from low-income families (based on eligibility for free lunch) may be designated a target area . . . . *The Committee bill reduces this minimum to 20 percent out of a concern that inflexible targeting requirements could force some school districts with very high incidences of poverty to declare schools with 20 percent low-income enrollment ineligible, while schools with only 10 percent low-income enrollment or less might be eligible in wealthier neighboring districts.* H.R. Rep. No. 1137, 95th Cong., 2d Sess. 22, *reprinted in 1978 U.S. Code Cong. & Ad. News* 4992.[11] (Emphasis added).

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[10] At the time of the legislative hearings, §116a.20(b)(2) of the Title I regulations permitted a local school district (LEA), subject to State approval (SEA), to designate as Title I project areas those attendance areas in which at least *30%* of the children were from low-income families. 45 C.F.R. §116.20(b)(2); 41 F.R. 42914 (September 28, 1976). Although this 30% rule was in effect at the time of the administrative proceeding below, it was not applied to the Newark program because it was not in effect during the audit period. Had the 30% rule been applied to Newark, seven of the thirteen attendance areas declared ineligible by the auditors would have qualified for Title I funding. The Title I moneys expended in these seven 30% areas totaled $563,221. Therefore, by application of the 30% rule, the Newark disallowance of $1,029,630 would have been reduced to a disallowance of $468,-083.

[11] See the Joint Explanatory Statement of the Committee of Conference indicating that by Senate amendment, the minimum percentage was raised to 25%; it is that minimum which was enacted as part of the 1978 Amendments to the ESEA. H.R. Conf. Rep. No. 1753, 95th Cong., 2d Sess. 255, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 5158.

The 25% eligibility standard was enacted by Congress to eliminate the inequities caused by administrative action which frustrated rather than furthered the original objectives of the Title I program. The enactment of this eligibility standard reformed administration of the Title I program so that the children it was meant to serve—educationally deprived children living in areas with high concentrations of poverty—would not be denied the benefits of much needed educational programs. Not only is there an absence of legislative direction in the 1978 Amendments against retroactive application of the corrective 25% eligibility standard, but the legislative history surrounding its enactment clearly supports its use to measure the eligibility of the Newark attendance areas for receipt of Title I moneys. Not to do so would be to judge the eligibility of these attendance areas by a regulation which, following the Newark audit, was modified by the agency itself and which, most significantly, was specifically invalidated by the 25% eligiblity standard of the 1978 Amendments.[12]

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[12] Having determined to retroactively apply 20 U.S.C. §2732(a)(1), the Third Circuit did not confront the legality of 45 C.F.R. §116.17(d) (1972), the Title I regulation which the federal auditors utilized to disqualify the Newark attendance areas. The court below did find, however, that this regulation frustrated the basic objectives of the Title I program. *State of N.J., Dept. of Education* v. *Hufstedler, supra*, 724 F.2d at 36-37. It is well established that in order for a regulation to be regarded as valid, it must be consistent with the statute under which it is promulgated. *United States* v. *Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977). The power of an administrative officer or agency "to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Manhattan General Equip. Co.* v. *Comm'r*, 297 U.S. 129,

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Finally, the retroactive application of the 25% eligibility standard to the Newark Title I program will visit no harm, much less "manifest injustice," on the federal government. In *Bradley*, the Court identified three concerns pertinent to the "manifest injustice" exception to the general rule requiring application of the law in effect at the time of decision. These factors are "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Bradley, supra*, 416 U.S. at 717, 94 S.Ct. at 2019.

With regard to the first factor, this Court distinguished suits involving "great national concerns," and parties who are public entities, from private suits involving individuals. *Bradley, supra*, 416 U.S. at 718-719, 94 S.Ct. at 2019-2020, citing *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 2 L.Ed. 49 (1801). Where private parties are concerned, the Court warned lower courts to "struggle hard against a construction which will, by a retroactive operation, affect the rights of parties." *Bradley, supra*, 416 U.S. at 717, 94 S.Ct. at 2019, citing *Schooner Peggy, supra*, 1 Cranch at 110. The instant matter, however, clearly involves important federal legislation of great

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134, 56 S.Ct. 397, 80 L.Ed.2d 528 (1936). A regulation which fails to carry out the legislative intent, but rather operates "to create a rule out of harmony with the statute, is a mere nullity." *Ibid.*; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976); *Dixon* v. *United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 14 L.Ed.2d 223 (1965). Insofar as the controverted regulation was not reasonably related to the Congressional purpose, but rather defeated that purpose by denying eligible children compensatory education programs simply because they lived in school districts with exceptionally high levels of poverty, the court below could have reasonably found the rule a nullity and reversed the resultant disqualifications.

national concern, namely the largest federal program of assistance to education which is intended to focus upon the most educationally deprived children in the country. Retroactive application of the corrective 25% eligibility standard enacted as part of the 1978 Amendments to the ESEA is also encouraged by the fact that the parties to this suit are public entities. Indeed, courts have refused to find prejudice or manifest injustice in the application of new legislation to pending matters when the only interests impaired by the congressional action are those of the government itself. *See Hill* v. *United States*, 571 F.2d 1098, 1102 (9th Cir. 1978).

With regard to the "nature of the rights" of the parties and the "nature of the impact of the change in law upon those rights," there is clearly no vested right, in the matter *sub judice*, in the continued application of an administrative regulation which impedes the basic objectives of the Title I program. On the contrary, the only true right involved herein is the public "right" or expectation that Title I moneys will be expended to provide necessary compensatory education programs structured to meet the special needs of poor children living in areas with high concentrations of poverty. To the extent that the retroactive application of the 25% eligibility standard contained in the 1978 Amendments conforms implementation of that program to its original objective, it augments rather than impairs, that public right. The retroactive application of this eligibility standard to the Newark Title I program, therefore, presents no factors which would trigger the "manifest injustice" exception to retroactivity.

The decision of the Third Circuit to apply the 25% eligiblity standard to the Newark Title I program is, therefore, in accord with sound judicial precedent since this standard is the law in effect at the time of decision and

since there is no statutory direction against such application nor "manifest injustice" resulting therefrom.

The Secretary also contends that this Court should grant *certiorari* since the decision below "cannot be reconciled with the approach of other courts of appeal." (Pb7). A reading of the purportedly "irreconcilable" decisions cited by the Secretary demonstrates that the other courts simply did not consider the issue before the Third Circuit. These courts did not have to determine whether eligibility for receipt of Title I moneys, or for any other federal grant, should be measured by a legislative amendment which corrected an administrative rule which thwarted the original Congressional objective in enacting that program or whether eligibility should be judged by the legislatively discredited agency rule. Since the other circuits neither considered nor resolved this issue, there can be no conflict nor division between the Third Circuit and the other courts of appeal. It is only such direct conflict or division among and between the circuits "on the same matter" which, pursuant to Rule 17(1)(a), will be considered by this Court when determining whether to exercise its discretion and grant a petition for writ of *certiorari*.

Indeed, the decision below is singularly lacking in those factors which might justify review by this Court. As fully discussed *ante*, this decision is in accord with sound judicial precedent and announces no novel principle of law. Furthermore, it simply does not have the broad ramifications suggested by the Secretary. While there may be $68 million in Title I audit claims outstanding, the Secretary does not disclose what percentage involve pre-1978 Title I programs and how many claims, if any, implicate the 25% eligibility standard. It would only be such a claim, if one exists, involving a recipient in the Third Circuit which would be directly impacted by the decision below. Similarly, while a survey of major federal granting agencies may show $830 million in grant exceptions, there is no indication of the percentage within the Third Circuit nor, more importantly, any indication as to how many within the Third Circuit involve the unique situation confronted by the court below. It was only when faced with a grant program conducted by a recipient in a manner which furthered the original Congressional objective, but was disqualified by virtue of an administrative regulation which was later rejected by Congress as inharmonious with its original intent, that the Third Circuit applied a subsequently enacted eligibility standard to an earlier grant program. The Third Circuit would, undoubtedly, put any challenge advanced by a federal grant recipient, based upon the decision below, to a similar rigorous analysis. The decision below is therefore not only quite narrow as to its holding but also extremely limited in its potential impact.

Furthermore, the court below did not absolve New Jersey and the Newark school district of their responsibilities under Title I legislation. Rather, having concluded that the 25% eligibility standard should be applied to the Newark Title I program, it remanded the matter to the Secretary for further proceedings to determine whether Newark qualified, under the statute, for application of this standard. Upon remand, New Jersey will have the burden of demonstrating compliance thereby assuring that the basic objectives of the Title I program have been met; it is a burden which New Jersey is ready and willing to shoulder. Furthermore, the application of the 25% eligibility standard does not implicate the whole of the Newark disallowances. Of the 13 school attendance areas found ineligible for Title I funds by the federal auditors, three had an incidence of poverty below 25%. Under the Court's ruling, the disallowances in these attendance areas, totalling $247,843, would be sustained. The

decision below, therefore, does not undermine the important federal audit process; it merely serves to assure that the auditing process does not result in disallowances of expenditures which furthered the basic objectives of the grant program and were made in accordance with appropriate eligibility standards.

Finally, in reaching its determination, the court below focused unerringly upon the Congressional objectives in enacting the Title I program—that poor, educationally disadvantaged children living in areas with high concentrations of poverty would be provided programs of compensatory education tailored to meet their special educational needs. The Third Circuit concluded that the poor, disadvantaged children of Newark living in attendance areas where the levels of poverty were in excess of 25% and 30% were precisely the children who were the intended beneficiaries of the Title I program. As a decision which faithfully and correctly advances the basic educational objectives of the Title I program, it need not be reviewed by this Court.[13]

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[13] The federal commitment to better the educational lot of poor, disadvantaged children, as evidenced by the Title I program, is clearly matched by New Jersey's commitment in this area. While Title I moneys available to educationally disadvantaged children in Newark have remained fairly constant, *i.e.* $9,631,019 in 1970-71; $9,899,446 in 1971-72; $9,379,648 in 1972-73 and $10,795,535 in 1982-83; State aid to Newark has increased dramatically, *i.e.* $21,566,996 in 1970-71; $29,069,240 in 1971-72; $38,517,410 in 1972-73 and $132,769,653 in 1982-83. *Twentieth Annual Report of the Commissioner of Education,* State of New Jersey; *Twenty-First Annual Report of the Commissioner of Education,* State of New Jersey; *Twenty-Second Annual Report of the Commissioner of Education,* State of New Jersey; *Thirty-Second Annual Report of the Commissioner of Education, State of New Jersey.*

CONCLUSION

For these reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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No. 83-2064 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1984

T.H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2064

T.H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

Respondent's argument in support of the decision of the court of appeals turns largely on the assertion that the regulation that respondent violated, 45 C.F.R. 116.17(d) (1972), was "aberrant," "discredited" (Br. in Opp. i), and disapproved by Congress as frustrating the objectives of Title I (Br. in Opp. 13).[1] If the court of appeals had agreed with this view, of course, it would have been unnecessary to consider the retroactivity of the 1978 Amendments. As respondent recognizes (Br. in Opp. 21 n. 12), the court could

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[1]The errors in respondent's strained construction of *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801), and *Bradley* v. *School Board*, 416 U.S. 696 (1974), are discussed in our petition (at 11-15). We note in addition that respondent fails to address our contention that, as a practical matter, it would be impossible to operate large scale audit programs like those required by Title I if the auditors had to reaudit old claims under the current provisions every time the statute or regulations are amended.

simply have declared the regulation invalid. But neither the court below, nor Congress in amending the statute, suggested that the regulation was not fully consistent with the pre-1978 statute.

It clearly was so. The Elementary and Secondary Education Act of 1965 provided for the disbursement of Title I funds to needy school districts to provide special services for educationally deprived children "in school attendance areas having high concentrations of children from low-income families" (20 U.S.C. (1976 ed.) 241e(a)(1)(A)). The Act also required that Title I programs had to be of "sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting those needs" (20 U.S.C. (1976 ed.) 241e(a)(1)(B)). As respondent notes (Br. in Opp. 2), in this case the Newark school district received the correct amount of funds for the period in dispute. The problem addressed by 45 C.F.R. 116.17(d) (1972) was how the available funds should be distributed *within* that district. It was surely reasonable for the Secretary to conclude that the aim of Title I, to provide meaningful supplemental programs for the nation's most seriously educationally deprived children, would best be served by focusing limited funds on the poorest areas in each district, rather than by permitting wider disbursement of the funds in poorer districts, with the concomitant risk that the funds available, as so dispersed, would provide less meaningful assistance to any child.[2]

The difficult judgment concerning educational policies reflected in 45 C.F.R. 116.17(d) (1972) is precisely the kind that justifies reliance upon agency expertise, especially where Congress has delegated specific rulemaking authority

[2]Appropriations for Title I have never been sufficient to serve all eligible children. See H.R. Rep. 95-1137, 95th Cong., 2d Sess. 7 (1978).

to the agency. 20 U.S.C. (1976 ed.) 241e(a), 242(b).[3] It is no reflection on the reasonableness of this judgment that Congress, in light of the experience accumulated in the administration of the Act, decided (more than eleven years after promulgation of the regulation) that some modification of the statute was appropriate.[4] See also Lawyers' Comm. Am. Br. 9-12.

Respondent also contends (Br. in Opp. 17 n. 9) that 1 U.S.C. 109, the general savings clause, does not apply to save liabilities incurred under regulations adopted pursuant to statutes that subsequently were amended, rather than directly under the statutes themselves. In support of this novel argument, respondent cites, out of context, dicta in *Rodgers* v. *United States*, 158 F.2d 835 (6th Cir.), rev'd, 332 U.S. 371 (1947).[5] But this Court has not hesitated to

[3]As this Court explained in *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977) (citation and footnote omitted), when specific rulemaking authority is delegated to an agency, "Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term[s]. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner."

[4]The regulation violated by respondent was promulgated in 1967 (32 Fed. Reg. 2742). It was revised in 1976 to allow local educational agencies to designate all school attendance areas with a low income factor of at least 30% to be eligible for Title I services under certain circumstances (45 C.F.R. 116a.20(b)(2) (1976)). Congress did not alter the agency's policy judgment entirely when it amended the Act in 1978. Instead, it simply modified that judgment by reducing the 30% figure to 25% under certain circumstances. Thus, rather than a rejection of the earlier agency regulations, the new legislation represented a fine tuning of the statute in light of the experience gained under those regulations.

[5]In *Rodgers*, penalties were imposed on defendant for marketing cotton in excess of the quotas established by regulations of the Secretary of Agriculture for 1940-1942. The court of appeals rejected defendant's argument that the Secretary's decision not to impose quotas for 1943 and subsequent years precluded collection of the penalties for the

apply the general savings clause to preserve liabilities incurred under regulations issued pursuant to expired statutes. See *United States* v. *Palletz*, 330 U.S. 812 (1946) (reversing, on authority (inter alia) of general savings clause, judgments dismissing prosecutions for violations of regulations issued under Emergency Price Control Act of 1942, after expiration thereof); *United States* v. *Wheelbarger*, 331 U.S. 791 (same; see 71 F. Supp. 52 (D. Ore. 1947)). Cf. *United States* v. *Fortier*, 342 U.S. 160, 161 n. 2 (1951) (distinguishing situation where alleged violation did not occur until after expiration of regulation); *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386 (1953) (applying general savings clause to preserve liability under insurance policy issued pursuant to expired statute). It is clear, despite respondent's contrary claim (Br. in Opp. 17 n.9), that the plain language of the general savings clause, preserving "liability incurred under [an expired] statute" includes a liability that is incurred under a regulation validly issued pursuant to the statute. Such a liability is no less "incurred under" the statute than it is under the regulation. See *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). Cf. *United States* v. *Williams*, 8 Mont. 85, 19 P. 288 (1888).

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earlier years. Although reaching the same result as that required by the general savings clause, the court disavowed reliance on it, in the passage quoted by respondent. The court went on to distinguish the situation before it, where the statute remained unaltered and the administrator charged with implementing its policies amended the regulation to reflect changing circumstances, from the situation where the statute itself is altered so that the agency's power to enforce the regulation prospectively is "terminated by controlling action from the very source of power which permitted it to be enacted and enforced" (158 F.2d at 837). The court thus strongly implied that the general savings clause would apply in the latter case, which is the one involved here. This Court reversed the court of appeals' award of interest on the penalties due (332 U.S. 371 (1947)).

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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Nos. 83-1798 and 83-2064

IN THE

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SECRETARY OF EDUCATION,
UNITED STATES DEPARTMENT OF EDUCATION,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF EDUCATION

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

v.

STATE OF NEW JERSEY

On Certiorari to the United States Courts of Appeals for the Third Circuit and for the Sixth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 83-1798 and 83-2064

SECRETARY OF EDUCATION,
UNITED STATES DEPARTMENT OF EDUCATION,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF EDUCATION

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

v.

STATE OF NEW JERSEY

On Certiorari to the United States Courts of Appeals for the Third Circuit and for the Sixth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights for all Americans. The Committee has, over the past 21 years, enlisted the

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[1] Letters from counsel for the parties consenting to the filing of this brief have been submitted to the Clerk.

services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The Lawyers' Committee has had a long-standing interest in Title I of the Elementary and Secondary Education Act of 1965[2] because of the statutory emphasis upon meeting the needs of poor and disadvantaged children. The Committee has sought to promote vigorous enforcement of the programmatic and fiscal restrictions in the statute and implementing regulations.[3]

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[2] In 1981 the Title I program was replaced by "Chapter 1" of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, §§ 552 *et seq.*, 95 Stat. 464-69 (codified at 20 U.S.C. §§ 3801 *et seq.* (1982)). Chapter 1 retains the Title I focus upon assisting educationally disadvantaged children residing in high poverty areas, *see* Pub. L. No. 97-35, § 552, 95 Stat. 464 (codified at 20 U.S.C. § 3801 (1982)), as well as the specific targeting and non-supplanting provisions of the Title I law, *see id.*, §§ 556(b)(1), 558(b), 95 Stat. 466, 468 (codified at 20 U.S.C. § 3805(b)(1), 3807(b) (1982)). Hence, the rulings below have continuing importance for the major federal program of aid to elementary and secondary schools.

[3] In the early 1970's the Committee began to monitor the administration of the Title I program, in order to determine whether states and local school districts were using their grants to operate projects which carried out its basic purpose. These activities greatly intensified in 1975 with the establishment of the Committee's Federal Education Project. One of the Project's major goals was to stimulate adherence to the categorical restrictions of the Title I statute and regulations in order to increase the effectiveness of local compensatory programs. The Project served as an informational resource for parents of Title I participants and Title I staff in local school districts, and it provided legal representation to parents of Title I students in litigation and administrative complaint proceedings, including an important supplanting case, *Alexander v. Califano*, 432 F. Supp. 1182 (N.D. Cal. 1977).

In 1976, pursuant to a contract with the National Institute of Education, the Lawyers' Committee established a separately staffed unit, the Legal Standards Project, to investigate and analyze the legal framework of Title I. At the request of members of the Congressional authorizing committees, this project subsequently made extensive recommendations for legislative changes and prepared a draft bill. Many of its suggestions were incorporated in the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2143 *et seq.*, and the Congress' reliance upon the work of the Legal Standards Project is acknowledged in the legislative history of the 1978 amendments.

Appropriations for Title I and Chapter 1 were not and are not unlimited. For this reason, each year thousands of educationally deprived students cannot receive compensatory services. Congress was conscious of this fiscal reality and wrote into law a set of requirements that are central to the functioning of an effective program, including (1) accurate targeting of compensatory projects to serve only eligible schools and attendance areas, and (2) continuation of state and local expenditures for basic education programs for participating children so that federally funded projects provide *extra* services to needy students.

Compliance with these requirements is essential, in our judgment, to the educational effectiveness of compensatory instruction projects funded by the federal government. Our experience indicates that meaningful compliance depends, in significant part, upon the expectation that audit and recoupment of misspent funds will follow any failure to adhere to the terms and conditions of the program. Thus, the Committee is concerned that the holdings below, anouncing rules of construction which defeat recovery of funds not expended in accordance with grant-in-aid agreements accepted by Kentucky and New Jersey, will have a detrimental impact upon educational opportunities for poor children by weakening the incentive for adherence to statutory and regulatory requirements.

Rather than crediting ingenious arguments that evade the Congressional intention expressed in these statutory restrictions, as the courts below did, state and local education officials should be held to adhere to the fiscal and program limitations of federal law, as interpreted by the Department of Education, when audit proceedings are subjected to judicial review.

STATEMENT

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act,[4] which provided federal grants to states and local school districts for programs designed to assist educationally deprived children in areas with high concentrations of low-income families. In order to ensure that Title I grants benefited these children, the statute included specific conditions with which state education agencies (SEAs) and local education agencies (LEAs) were required to comply.[5] Two conditions are particularly relevant to these cases: *first*, Title I funds could be expended only for projects serving eligible attendance areas and schools; *second*, students participating in Title I projects had to receive their "fair share" of state and local expenditures so that federal funds provided truly supplemental services.[6] State and federal audits were authorized to assess local compliance with statutory criteria.

New Jersey and Kentucky participated in the Title I program each year following its enactment and were aware of the various statutory and regulatory requirements for participation. However, audits conducted by the United States Department of Health, Education and Welfare[7] resulted in determinations that both States had misapplied substantial amounts of federal Title I funds.

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[4] Pub. L. No. 89-10, 79 Stat. 27, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, as renumbered by Pub. L. No. 89-750, § 116, 80 Stat. 1191, 1198, *reprinted in* 1966 U.S. Code Cong. & Ad. News 1392, 1400.

[5] These conditions were repeated and amplified in the administrative regulations and further clarified in numerous Title I Program Guides sent to all of the states as early as 1968. *See infra* notes 48-51 & accompanying text, 55-57 & accompanying text.

[6] The same sorts of restrictions apply to the grant-in-aid program which replaced Title I. *See supra* note 2.

[7] The Title I program was administered by the Department of Health, Education and Welfare prior to the creation of the Department of Education by Pub. L. No. 96-88, 93 Stat. 668, *reprinted in* 1979 U.S. Code Cong. & Ad. News 668 (codified at 20 U.S.C. §§ 3401 *et seq.* (1982)).

New Jersey. Federal auditors found that the SEA incorrectly approved Title I grant applications for the 1970-71 and 1971-72 school years from the Newark LEA, which then used the grant funds in school attendance areas that were not eligible to participate in the Title I program.[8] New Jersey disputed these findings,[9] but except for reductions required by a "statute of limitations"[10] the Education Appeal Board sustained the auditors' claims and the Secretary of Education declined

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[8] *See* Joint Appendix at 11-34, *Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312 (1983) (Final Audit Report) [hereinafter cited as N.J.J.A.]. The federal statute required that projects be located to serve "school attendance areas having high concentrations of children from low-income families," 20 U.S.C. § 241e(a)(1)(A) (1970). Regulations and Title I Program Guides issued between 1965 and 1970 by the Department of Health, Education and Welfare, *see Wheeler v. Barrera*, 417 U.S. 402, 407, 420 n.14 (1974), defined this term to mean attendance areas having higher-than-average numbers or percentages of children from poor families than the school district as a whole. *See generally* N.J.J.A. at 14-16; *infra* pp. 23-27.

[9] The dispute as to the 1970-71 school year is whether the Newark LEA qualified for an exception to the usual eligibility requirement, *see supra* note 8, because there was "no wide variance," within the meaning of the regulations and Program Guides, in the level of poverty among the district's school attendance areas. The dispute as to the 1971-72 school year concerns the correct manner of documenting and comparing levels of poverty among attendance areas in determining eligibility.

[10] 20 U.S.C. § 884 (Supp. IV 1974), as added by Pub. L. No. 93-380, § 106, 88 Stat. 484, 512, *reprinted in* 1974 U.S. Code Cong. & Ad. News 541, 576, provided that:

> No state or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of this Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized.

See also H.R. Rep. No. 805, 93rd Cong., 2d Sess. 78-79, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4093, 4160. The currently applicable version of this provision is codified at 20 U.S.C. § 1234a(g) (1982).

to disturb its decision.[11] On review of the Department's action in the Court of Appeals,[12] a panel held that 1978 amendments to Title I which eased the eligibility requirements for school attendance areas [13] should be given retrospective effect so as to validate the earlier expenditures to the extent that they would have been proper under the new eligibility criteria.[14] The panel remanded to the Secretary of Education to determine precisely which of the challenged expenditures would have been permissible under the 1978 statutory amendments.[15]

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[11] *See* N.J. Pet. at 13a-15a.

[12] *See id.* at 15a n.12.

[13] Pub. L. No. 95-561, § 101(a), 92 Stat. 2143, 2161-62 (codified at 20 U.S.C. § 2732(a)(1) (1982)).

[14] N.J. Pet. at 4a-5a.

[15] There are two reasons why the expenditures in question might not have been lawful even had they been made after 1978. *First*, as the court below recognized, use of the provision added in 1978 was conditioned upon a special "maintenance of effort" requirement for compensatory programs; since New Jersey had not sought to rely upon the 1978 law prior to review in the Court of Appeals, the record previously made in the administrative proceedings is not adequate to determine whether this condition has been met (*see* N.J. Pet. at 5a). *Second*, the Title I law and regulations always required that projects be of "sufficient size, scope and quality" to offer hope of significant achievement gains for participants. *See* Pub. L. No. 89-10, § 2, 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (current version at 20 U.S.C. § 2734(d) (1982)). This requirement usually resulted in a school district's establishing Title I projects at fewer than all eligible schools, in light of limited Congressional appropriations—which never reached the authorization level contained in the statute. *See infra* note 51. Because, in this case, the federal auditors determined that the number of eligible schools was itself improperly inflated, they had no occasion to consider whether Newark's Title I program during the years in question otherwise met the "size, scope and quality" requirement. Thus, even if the 1978 amendments' 25%-eligibility provision could be used in Newark, questions about the program's conformity with other statutory and regulatory requirements would remain. Nevertheless, this matter is ripe for review since the decision below finally—and erroneously—determines the issue of retroactivity and will bind the Department of Education in Title I audit cases which are now pending and which may in the future arise from the States within the Third Circuit. *Cf.* N.J. Pet. at 16 ($68 million in Title I audit claims pending).

Kentucky. In Fiscal Year 1974, with SEA approval, some 50 LEAs throughout the state placed first- and second-grade Title I participants in separate classrooms with Title I teachers. Except for a few "enrichment classes," these students received their entire academic instruction, including the basic state-mandated curriculum, through the federally funded Title I program.[16] Although gross state and local expenditures at Title I schools were not reduced, again with the exception of the enrichment classes the students participating in Title I did not receive the benefit of any of these expenditures.

Federal auditors concluded that these practices constituted "supplanting" in violation of the statutory requirement that Title I funds

> be [so] used (i) as to supplement . . . the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources *for the education of pupils participating in programs and projects assisted under this subchapter*, and (ii) in no case, as to supplant such funds from non-Federal sources.[17]

With certain modifications not relevant to the issues before this Court, the Education Appeal Board and the Secretary of Education upheld the auditors' supplanting findings.[18] A panel of the Court of Appeals, however,

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[16] Ky. Pet. at 22a (findings of Education Appeal Board).

[17] 20 U.S.C. § 241e(a)(3)(B) (1970) (emphasis added).

[18] The Audit Report sought repayment only of those Title I funds expended on readiness classes for students who were promoted to the next grade level at the end of the school year—apparently to avoid any question whether students retained at the same grade level would ultimately receive their "fair share" of state and local

refused to sustain the repayment demand. While the Department's interpretation of the statutory anti-supplanting language and implementing regulations was "reasonable" and would be controlling in future cases, the Court of Appeals said:

> [T]he statutory and regulatory provisions at issue were [not] sufficiently clear to apprise the Commonwealth of its responsibilities. . . .
>
> . . . .
>
> [I]t is unfair for the Secretary to assess a penalty against the Commonwealth for its purported failure to comply substantially with the requirements of law, where there is no evidence of bad faith and the Commonwealth's program complies with a reasonable interpretation of the law.[19]

SUMMARY OF ARGUMENT

I

Because the 1978 amendments to Title I explicitly were not made effective prior to October 1, 1978; because the statutory change upon which New Jersey seeks to rely is a substantive, rather than procedural or remedial one; because this matter arises from the state's voluntary acceptance of pre-1978 statutory terms and conditions under a federal grant program; and because the rule of retroactivity adopted by the Third Circuit is unworkable in

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resources when they repeated the same curriculum. *See* Joint Appendix in No. 83-1798, at 17 (Final Audit Report). The Department of Education adopted this position, despite the misgivings of the Education Appeal Board (*see* Ky. Pet. at 30a), and the case does not now turn upon the propriety of this approach. *See* Ky. Pet. at 16a. Additionally, the Secretary reduced the demand for repayment in light of the fact that the "readiness" classes were smaller than most regular classes in the state (*see* Ky. Pet. at 38a-42a). The correctness of this adjustment is also irrelevant at this time: the Sixth Circuit's ruling eliminates *any* repayment of *any* funds on account of *any* supplanting.

[19] Ky. Pet. at 9a-10a, 12a.

both the legislative and administrative process, its judgment should be reversed.

II

Because the case before the Sixth Circuit originated in Kentucky's petition for judicial review of agency action, once the Court of Appeals concluded that the Education Department's interpretation of the Title I statute and regulations was a "reasonable" one, it should have deferred to the agency. In addition, the view of the panel below that the statute and regulations were ambiguous is unsupportable.

III

Contrary to the arguments of New Jersey and Kentucky and the intimations of the courts below, the grant conditions which the auditors found those states to have violated were adopted early in the history of the Title I program, were repeatedly communicated to the states, and were critical to the effectiveness of the compensatory projects funded by the federal government.

ARGUMENT

Introduction

In *Bell v. New Jersey*, —— U.S. ——, ——, 76 L. Ed. 2d 312, 326 (1983), this Court ruled "that the pre-1978 version of [Title I] requires that recipients be held liable for funds that they misuse"[20] by making repay-

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[20] *See also id.*, 76 L. Ed. 2d at 322, quoting S. Rep. No. 634, 91st Cong., 2d Sess. 84, *reprinted in* 1970 U.S. Code Cong. & Ad. News 2768, 2827 ("Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer"). The states are, of course, accorded substantial opportunities to demonstrate the propriety of challenged expenditures and have a right to judicial review prior to making any repayment. *See id.*, 76 L. Ed. 2d at 327-28.

ment to the United States.[21] The decisions below will substantially frustrate the ability of the federal government to obtain such repayments. Without any basis in the statutory language or legislative history, and contrary to longstanding administrative interpretations of the law, the courts below extinguished the obligations of Kentucky and New Jersey to repay Title I funds expended in contravention of statutory and regulatory provisions[22] in force at the time the states accepted Title I

[21] Up to 75% of the amount recovered may be returned to the state to be used, "to the extent possible, for the benefit of the population that was affected by the failure to comply or by the misexpenditures which resulted in the audit exception," 20 U.S.C. § 1234e(a)(2) (1982). *See* Ky. Pet. at 15 n.13.

[22] For purposes of resolving the legal issues presented to this Court, it must be assumed that the states and their constituent LEAs failed to comply with relevant federal program requirements. *See Bell v. New Jersey*, 76 L. Ed. 2d at 327.

In the *Kentucky* case, the Sixth Circuit panel declined to enforce the Secretary's demand for repayment because of its view that the Title I regulations were "ambiguous," the misexpenditures identified by the auditors therefore did not constitute "substantial noncompliance," and for this reason repayment of the misspent funds was an "unfair . . . penalty" (*id.* at 12a). But the Court of Appeals agreed that the expenditures for "readiness" classes were inconsistent with the Department of Education's "reasonable" interpretation of the Title I statute and regulations (Ky. Pet. 8a-9a) and the Commonwealth has not challenged that determination.

In the *New Jersey* case, the state has acknowledged that " 'there were irregularities in the original grant approval process' " (N.J. Pet. 46a) resulting from the presence of a "flaw in the initial formula" used to determine eligible school attendance areas in the Newark district (*id.* at 45a). *See id.* at 40a (Decision of Education Appeal Board) ("the New Jersey SEA admits it did not meet the Title I requirements for determining the eligibility of school attendance areas for Title I funding when it approved Newark's 1971-72 project application with respect to 13 Newark schools"). Although New Jersey argued that at least some of these schools would have been eligible under a proper formula (*see id.* at 8a), the Third Circuit never decided this question. In 1981 that court held that the Secretary of Education had no authority to order repayment of misexpended funds, *New Jersey v. Hufstedler*, 662

grants.[23]

We agree fully with the United States that the rulings below are doctrinally unsound, for the reasons outlined in the first two arguments below. In addition, we submit that these rulings may ultimately be traced to the lower courts' erroneous perception that states and local school districts were burdened by unfair or unclear programmatic and fiscal restrictions which interfered with the educational efficacy of Title I projects. However, as we show in the third argument, the conditions which New Jersey and Kentucky violated were very deliberately inserted into the statutory scheme by Congress; they are central to the success of the compensatory education effort; they are comprehensible and capable of straightforward application; and they were promulgated and clearly explained to state officials by the federal government prior to the misexpenditures which are the subject of these suits.

I

The Third Circuit's Retroactivity Holding Is Contrary to Established Legal Principles And Is Unworkable

In the *New Jersey* case, the Third Circuit erroneously applied well-settled rules of statutory construction when it held that eligibility criteria enacted in 1978 could be

F.2d 208, *rev'd sub nom. Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312 (1983). On remand, the Third Circuit applied 1978 statutory amendments retroactively to validate Newark's eligibility determinations which, it said, "arguably overstated the relative size of the class of students from low-income families" (N.J. Pet. at 3a). The only question now before this Court, therefore, is whether the 1978 amendments should have been applied in this retrospective manner to excuse New Jersey from the obligation it would otherwise have to repay funds to the Department of Education.

[23] *See* 76 L. Ed. 2d at 326 ("The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I").

applied retrospectively, so as to excuse a Title I grant recipient's noncompliance with different criteria that were contained in federal law when the disputed expenditures were made (in 1970-71 and 1971-72). The 1978 amendments to Title I specifically provided that "the provisions of this Act and the amendments and repeals made by this Act [34] shall take effect October 1, 1978.[25] Thus, the panel below erred in concluding that "[t]here is . . . nothing in the 1978 amendments or the legislative history [which] indicates that the amendments were not intended to be applied retroactively" (N.J. Pet. 4a). And, that being the case, the predicate for application of the *Bradley* [26] principle evaporates.

Moreover, *Bradley* involved remedial, not substantive, changes in the law;[27] thus, even in the absence of the legislative directive for prospective application contained in the 1978 amendments,[28] *Bradley* would be inapplicable. Where new legislation alters a substantive provision of

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[24] New Jersey does not contend, and the Third Circuit did not hold, that the 1978 amendments explicitly repealed or explicitly amended, retrospectively, the previous eligibility standards which the auditors found to have been violated. Repeals by implication of course are not favored. *E.g., Kremer v. Chemical Construction Company*, 456 U.S. 461, 468-78 (1982).

[25] Pub. L. No. 95-561, § 1530, 92 Stat. 2143, 2380, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2143, 2380.

[26] *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974). *See* N.J. Pet. 4a.

[27] In *Bradley*, this Court noted that upon enactment of § 718 of the Education Amendments of 1972, authorizing the award of attorneys' fees to prevailing plaintiffs in school desegregation cases, "there was no change in the substantive obligation of the parties." 416 U.S. at 721. Here there is no question about the substantive impact of the 1978 amendments in altering school attendance area eligibility criteria. *See also Bell v. New Jersey*, 76 L. Ed. 2d at 318 n.3.

[28] *See supra* note 25 and accompanying text.

a statutory scheme, the general rule is that it is to be given prospective effect only.[29]

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[29] *E.g., United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982). *Compare* N.J. Pet. at 17a-18a (summarizing New Jersey's earlier arguments against retroactive application of 1978 amendment to Title I delineating audit repayment obligation).

Congress uses explicit language when it wishes a substantive statutory amendment to have retrospective effect. For example, in 1984 the House of Representatives adopted amendments to the Gneral Education Provisions Act designed to alter the auditing and repayment process. *See* 129 Cong. Rec. H7891 (introduction of final version), H7902-03 (§ 808), H7904 (passage) (daily ed., July 26, 1984). These amendments deliberately avoided the use of language which would have given them retrospective application in pending audit proceedings. As their primary floor sponsor recognized, retroactivity

> would violate the basic principle that grantees should be held accountable for the expenditures of funds under the law as it was when they received the funds. A current law standard would treat differently grantees who received funds at the same time. Depending on when they were audited, grantees would be held to different program requirements based upon the state of the law when they were audited. A grant might be made on the basis of one set of standards, an audit conducted on a second, an administrative appeal heard on a third, and judicial review sought on a fourth.

Id. at H7814 (Rep. Ford) (daily ed., July 25, 1984).

However, the measure adopted by the House would have made certain provisions of the *1978 Title I amendments* retrospective. Section 808(a)(4) of Rep. Ford's floor amendment, *id.* at H7903 (daily ed., July 26, 1984), provided:

> In any final audit determination pending before the Secretary of Education or the Education Appeals Board on or made after the date of enactment of this Act pursuant to section 452 of the General Education Provisions Act (20 U.S.C. 1234b), the provisions of sections 122(a)(1) and 132 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2732(a)(1), 2752) shall be considered to apply with respect to expenditures made before October 1, 1978, in the same manner that such provisions apply to expenditures made on or after that date, without regard to the provisions of subsections (b)(2),

There is a further reason why the *Bradley* principle is inapplicable to the dispute between New Jersey and the United States. Because it arises out of the state's voluntary acceptance of federal funds in exchange for "its assurance that it would abide by the conditions [contained in the statute and regulations]," [30] the case is governed by principles of contract law. Post-grant legislation is relevant only insofar as it unambiguously represents a waiver of the contractual conditions.[31] Absent such a waiver, there is no basis for modifying the con-

(e), and (f) of section 131 of such Act (20 U.S.C. 2751) requiring that certain determinations be made in advance.

This portion of the bill would have mooted the *New Jersey* case by authorizing retrospective use of the "25% rule." It was, however, dropped from the legislation prior to its final passage. *See* 129 Cong. Rec. S12906 (Sen. Hatch), S12908 (Sen. Kennedy) ("One issue that was included in the House legislation but dropped in conference was the audit reform provisions"), S12909 (passage of conference report) (daily ed., October 3, 1984); *id.* at H11425 (Rep. Hawkins), *id.* (Rep. Jeffords), H11426 (Rep. Ford), H11429 (Rep. Goodling), H11430 (acceptance of conference report) (daily ed., October 4, 1984).

This history indicates that the Congress can and does employ explicit retroactivity language when it desires to create an exception to the general rule that substantive amendments apply only prospectively, especially in grant programs.

[30] *Bell v. New Jersey*, 76 L. Ed. 2d at 326-27; *see also, id.* at 329 (White, J., concurring).

[31] Enactment of a bill directing the Secretary of Education not to seek to recover misexpenditures identified in audits completed prior to a specified date would constitute a waiver. (Such measures were considered by the Congress in 1980 and 1981 but never enacted. *See Dismissing Certain Cases Pending Before the Education Appeal Board: Hearings on H.R. 8145 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Educ. & Labor*, 96th Cong.. 2d Sess. (1980) (bill never reported out); 127 Cong. Rec. S5427-30, S5442 (daily ed., May 21, 1981) (floor amendment rejected on point of order).) Similarly, the five-year "statute of limitations" on repayment of misexpenditures of Title I funds, *see supra* note 10, is such a waiver under the circumstances specified in that provision.

tractual understanding between the parties by virtue of a subsequent enactment applying to future grants; this amounts to rewriting the contract to the detriment of the Department of Education, and that of the program's beneficiaries.

Finally, because of its consequences both for the legislative process and for administration of federal assistance programs, the Third Circuit's ruling is unworkable. As this Court is well aware, the statutory framework of federal grant programs rarely remains completely unchanged; rather, successive Congresses often amend and re-amend an enactment in the light of experience and perceptions. Indeed, State and local grantees are among the most fervent supporters of this "fine tuning." [32] For this reason, if the decision below is permitted to stand, federal grantees subject to audit exceptions can be expected to seek repeated statutory changes that would make their past non-compliance with program requirements conform to the law. The incentive to maintain compliance with statutory and regulatory provisions will

[32] *See, e.g., Oversight Hearing on Amendments to Title I of ESEA and GEPA: Hearings Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Educ. & Labor*, 96th Cong., 1st Sess. 26-32 (1979) (testimony of New York City Schools Chancellor Macchiarola supporting amendment to drop matching funds requirement for schoolwide projects); *Education Amendments of 1977: Hearings on S. 1753 Before the Subcommittee on Education, Arts and Humanities of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 1554-58 (1977) (statement of Akron Superintendent of Schools Conrad Ott, requesting amendment to permit continuing services to students who formerly attended Title I-eligible schools that were closed); *id.* at 1397-99 (statement of Pennsylvania Secretary of Education Caryl M. Kline, proposing modification of supplanting provision); *Elementary and Secondary Education Amendments of 1973: Hearings on H.R. 16, H.R. 69, H.R. 5163, and H.R. 5823 Before the General Subcommittee on Education of the House Comm. on Educ. & Labor*, 93rd Cong., 1st Sess. 419 (1973) (testimony of Chicago Assistant Superintendent James Moffat, seeking elimination of annual school eligibility requirement).

be substantially diminished; federal program beneficiaries—in this case, educationally disadvantaged children who most need assistance—will be the losers.

The Third Circuit's approach imputes to the Congress, each time a grant program statute is amended, an intention to have the new provision apply in all pending administrative or judicial proceedings that relate to prior grants. Adoption of this standard, so different from that which presently prevails,[33] will vastly complicate the legislative process. Deliberations about the public policy benefits of any particular amendment will have to be accompanied by the production and analysis of large quantities of information about the current status of all audit exceptions or claims under the grant program, in order to assess the impact of retrospective application of the amendment in such proceedings. It simply defies experience to expect that the Congress will be able to shoulder these additional burdens and engage in reasoned lawmaking.

Since audit or claim proceedings often take years to resolve, many will be repeatedly affected by statutory changes under the Third Circuit's ruling, largely depriving the administrative enforcement process of the finality which is necessary if grantees are to know what is expected of them. Moreover, while the result is to New Jersey's liking in this instance, there seems to be no compelling reason why statutory changes which tighten, rather than relax, program requirements should not also be given retrospective application according to the rule adopted below. For it is inherently no more unjust to recover grant funds from states which fail to anticipate changes in the law than it is to deprive participants in federally funded grant programs of substantial additional benefits[34] because of such changes.

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[33] *See supra* note 29 and accompanying text.

[34] *See supra* note 21.

It is far more realistic, and sensible, to give substantive statutory changes retroactive effect only when Congress explicitly indicates its intention that this result should obtain.[35] That has long been the preferred approach; because the Third Circuit panel departed from that approach without justification, its judgment cannot stand.

II

The Sixth Circuit Erred by Refusing to Follow the Department of Education's "Reasonable" Interpretation of the Statute and Regulations and by Inventing a Wholly Inappropriate Standard for Repayment of Misspent Grant Monies

The Kentucky case reached the Sixth Circuit as a result of the state's petition for review of final administrative action taken by the Department of Education.[36] Accordingly, the task of the court below was a limited one: to determine "whether the [factual] findings of the Secretary are supported by substantial evidence and reflect application of the proper legal standards. § 455, 20 U.S.C. § 1234d(c); 5 U.S.C. § 706." *Bell v. New Jersey*, 76 L. Ed 2d at 328.

There was no controversy over the facts. The use of substantial amounts of Title I grant funds for "readiness" classes which substituted for participating students' regular, state and locally funded, academic education is admitted. The only matter for determination by the reviewing court was whether the reading of the statutory anti-supplanting language which is embodied in Departmental regulations, Program Guides, and the Secretary's interpretations thereof, was proper. As this Court has often emphasized, in this situation

> the task for the Court of Appeals was not to interpret the statute as it thought best but rather the

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[35] *See supra* note 29.

[36] *See Bell v. New Jersey*, 76 L. Ed. 2d at 318-20 n.3.

> narrower inquiry into whether the [agency's] construction was "sufficiently reasonable" to be accepted by a reviewing court. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153 (1946).[37]

The Sixth Circuit panel concluded that the Secretary's interpretation of the supplanting prohibition was "reasonable," Ky. Pet. at 8a & n.6. Indeed, far from finding that interpretation to be contrary to law, the Sixth Circuit agreed that, at least prospectively, it would be controlling. *Id.* at 12a. Pursuant to the precedent cited above, that should have been the end of the matter. Instead, the panel below embarked upon a wholly different inquiry than that directed by this Court:

> Nonetheless, in the instant case we do not feel it is our task on appeal to review the reasonableness of the Secretary's interpretation of Title I section 241 e(a)(3)(B) and regulation section 116.17(h). We are not reviewing with reference to the future effect of the Secretary's interpretation of a statute. Rather, in this appeal we are concerned with the fairness of imposing sanctions upon the Commonwealth of Kentucky for its "failure to substantially

[37] *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *accord, e.g., Chevron, U.S.A. v. Natural Resources Defense Council*, 52 U.S.L.W. 4845, 4847 n.11 (U.S. June 25, 1984); *Indiana Department of Public Instruction v. Bell*, 728 F.2d 938, 940 (7th Cir. 1984); *Psychiatric Institute of Washington, D.C. v. Schweiker*, 669 F.2d 812, 813-14 (D.C. Cir. 1981) (*per curiam*); *West Virginia v. Secretary of Edu-*

> comply"[8] with the requirements of section 241e (a)(3)(B) and 45 C.F.R. 116.17(h), as those requirements were ultimately interpreted by the Secretary.

[8] *See* 20 U.S.C. § 1234b(a) and § 1234c(a) (1978) (where the Commissioner is said to act upon the belief that a recipient of funds had "failed to comply substantially" with any requirement of law applicable to such funds).

Id. at 9a (footnote omitted).

There simply is no basis in law for this approach. Nothing in the Title I statute suggests that there should be one standard of deference to the administrative agency's interpretation in a declaratory judgment action looking to the future and another in a judicial review proceeding following an audit and demand for repayment.[38] "[T]he pre-1978 version [of Title I] contemplated that States misusing federal funds would incur a debt to the Federal Government for the amount misused . . . ." *Bell v. New Jersey*, 76 L. Ed 2d at 321. If the law were as stated by the court below, then federal grantees could with impunity ignore the "reasonable" interpretations of statutory and regulatory language by administrative agencies until those interpretations were first confirmed in court. This would largely defeat the purpose of delegating interpretive rulemaking authority to the agencies in the first place. The fact that the Court of Appeals viewed the statute and regulations as ambiguous, *see* Ky. Pet. at 9a-10a, 12a, 15a, does not justify the Sixth Circuit's lack of deference to the agency's reading of the law, for it is Congress' in-

[38] 20 U.S.C. §§ 1234b(a) and 1234c(a), cited in footnote 8 of the Court of Appeals' opinion, are inapposite since they deal only with cease-and-desist orders and withholding proceedings, rather than audits. The difference in standard, which in any event would not lead to a difference of result in the *Kentucky* case, *see infra* pp. 27-29, is a rational one. *See* Ky. Pet. at 11 n.9.

tention that the administrative agency should make the choice among alternative interpretations. *See, e.g., Psychiatric Institute of Washington, D.C. v. Schweiker, supra* note 37.

Even on its own terms, the decision below is not defensible. Although the Sixth Circuit characterized Kentucky's position as a "reasonable" one, it supported this assertion only with very general statements from the legislative history of Title I. *See* Ky. Pet. at 11a-12a. The panel simply slid over the precision of the statutory language requiring that federal funds not supplant "funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education *of pupils participating in programs* and projects assisted" by Title I, 20 U.S.C. § 241e(a)(3)(B) (1970) (emphasis added). *See* Ky. Pet. at 20a. It also ignored Congress' separate insertion into the Title I law in 1970 of a "comparability" requirement, 20 U.S.C. § 241e(a)(3)(C) (1970), which is addressed specifically to equivalence of school-level expenditures, rather than to participant entitlements.[39]

The Sixth Circuit similarly gave little attention to the Title I supplanting regulation in force at the time of the expenditures in question, which was equally explicit about the need to provide Title I participants with their fair share of state and local expenditures:

> Each application for a grant under Title I of the Act for educationally deprived children residing in a project area should contain an assurance that the use of the grant funds will not result in a decrease in the use for educationally deprived children residing in that project area of State or local funds

[39] *See* S. Rep. No. 634, 91st Cong., 2d Sess. 14-15, *reprinted in* 1970 U.S. Code Cong. & Ad. News 2768, 2781-82; 116 Cong. Rec. 10613 (Rep. Quie) (daily ed., April 17, 1970).

> which, in the absence of funds under Title I of the Act, would be made available for that project area and that *neither the project area nor the educationally deprived children residing therein* [*i.e.*, Title I participants] *will otherwise be penalized in the application of State and local funds because of such a use of funds* under Title I of the Act.

45 C.F.R. § 116.17(h) (1973) (emphasis added). The real problem which the Court of Appeals had with the Kentucky audit exception apparently was not the supposed ambiguity of the statute or regulations, but the panel's lack of sympathy with the policy choice made by Congress:

> Given a fixed number of dollars awarded to the school district, the requirement that average per pupil expenditures be transferred to the Title I classrooms, in proportion to the number of students in attendance there who are expected to advance a grade, cannot help but have an adverse impact on the funds available for the regular classroom when the number of regular classrooms and teachers cannot be reduced.[40]

Ky. Pet. at 15a. As we pointed out at the beginning of this section, however, the task of a Court of Appeals engaged in judicial review of agency action does not extend to rewriting the statute to conform to the court's view of the wisest policy. *Compare Alexander v. Califano*, 432 F. Supp. 1182, 1189, 1190 (N.D. Cal. 1977).[41]

[40] In fact, the Secretary of Education had already taken the concern expressed by the panel into account in reducing the amount of repayment which he requested to reflect the smaller pupil-teacher ratios in Title I classes as compared to regular classes. *See supra* note 18.

[41] "One may well differ, as a matter of educational policy, with the legislative choice to concentrate rather than spread aid among educationally deprived children, but that is not a matter for this Court. . . . That the enforcement of the federal requirement is likely to have an impact on State and local programs and may require changes in State regulations and guidelines is not a ground for

The panel of the Court of Appeals in the *Kentucky* case erred in seeking to do this, and its judgment should be reversed.

III

The Eligibility and Supplanting Restrictions at Issue in These Cases are Directly Related and Critical to the Purposes of the Title I Program—and the States Had Both Ample Notice of their Applicability and Adequate Explanation of their Requirements

Throughout the course of these proceedings, both New Jersey and Kentucky have attempted to convey the impression that the eligibility and supplanting restrictions involved in these audits interfered with the realization of the goals of the Title I program in their states' school districts, and also that the Department of Education's interpretations of the statutory and regulatory language were never clearly articulated and explained until the audits had taken place. These arguments are, to some extent, echoed in the opinions of the courts below [42] and they may have contributed to the legal errors made by the Third and Sixth Circuits. In fact, the substantive requirements at issue in these cases—the determination of school and attendance area eligibility, and the prohibition against supplanting state and local resources—are of central importance to the integrity and effectiveness of federal compensatory education programs, which constitute the largest part of federal aid to elementary and secondary education. These requirements have been a

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disregarding that requirement. Nor is the wisdom of the policy to concentrate compensatory education funds on a small number of pupils a matter for the Court's consideration." (footnote omitted.)

[42] *See, e.g.*, N.J. Pet. at 4a ("Congress enacted these [1978] amendments to correct the *injustice* which the earlier eligibility standards worked in areas with high concentrations of low-income families) (emphasis supplied); Ky. Pet. at 9a ("we are concerned with . . . the requirements of section 241e(a)(3)(B) and 45 C.F.R. 116.17(h), as those requirements were *ultimately* interpreted by the Secretary") (emphasis supplied); *supra* p. 21, text at note 40.

part of the Title I and Chapter 1 programs since their inception in 1965; the states were clearly notified of their applicability and scope long before the expenditures questioned in these audits and should not have had any difficulty in complying with them.

Eligibility. As we have noted, in order to promote the statutory goals, expenditures of grant funds must be targeted on discrete populations ("educationally deprived children"). While it would be highly desirable to assist all students in need of services, limited appropriations for the Title I program made this impossible. Hence, the statute provided that appropriations were to be allocated among States and school districts according to the number of children from low-income families,[43] and that funds were granted only for programs which would contribute to meeting the needs of educationally deprived children in areas within school districts where there are large concentrations of children from such families.[44]

The project area eligibility standards are linked to the additional requirement, which was maintained throughout all versions of the statute since Title I was first passed in 1965, that programs must be "of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting" those special

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[43] *See* 20 U.S.C. § 241c(2) (Supp. IV 1968); 20 U.S.C. § 2711(c) (1982); *see also* 20 U.S.C. § 3803 (1982) [Chapter 1].

[44] *See* 20 U.S.C. § 241e(a)(1)(A) (Supp. IV 1968); 20 U.S.C. § 2732 (1982); *see also* 20 U.S.C. § 3805(b)(1)(A) (1982) [Chapter 1]; *Alexander v. Califano*, 432 F. Supp. at 1189 (referring to "the legislative choice to concentrate rather than spread aid among educationally deprived children"). Once eligible project areas are selected, every child determined to be educationally deprived, regardless of economic status, is eligible to receive services. Educational deprivation is the sole criterion for deciding which children in a project area will participate in these federal programs.

needs.[45] The purpose of this provision is to avoid dissipation of federal grants by spreading them among too many underfunded projects in too many different schools. Because local school administrators are almost always under intense pressure to serve as many students as possible,[46] the threshold determination of eligible school attendance areas facilitates compliance with the "size, scope and quality" requirement. It is, for this reason, critical to the operation of successful compensatory programs.

The importance of the eligibility standard was consistently emphasized by the federal government and was well known to the Congress. For example, in 1966 the House Committee on Education and Labor reported amendments to the statute and commented:

> The committee notes that during the first year of operation funds have primarily been used in special projects in schools with the highest concentrations of children from low-income families. This is to be encouraged especially since funds are limited and therefore must be concentrated on the most pressing needs.[47]

Initial regulations which had allowed areas that did not meet the "highest concentrations of children from low-income families" requirement to be included in Title I

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[45] Pub. L. No. 89-10, § 205(a)(1)(B), 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (codified at 20 U.S.C. § 241e(a)(1)(B) (Supp. IV 1968)); *see* 20 U.S.C. § 3805(b)(3) (1982) [Chapter 1].

[46] *See* N.J.J.A. at 176 (New Jersey Department of Education's Application for Review of Final Audit Determination) ("LEA had no choice but to assume high concentrations of low-income families in all attendance areas and to attempt to spread the benefits of Title I as broadly as possible to assure that most educationally deprived children would be served").

[47] H.R. Rep. No. 1814, 89th Cong., 2d Sess. 3, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3844, 3846.

programs[48] were quickly amended in 1967 to remove this option,[49] and the change was specifically brought to the attention of state education officials.[50] Thereafter, communications from the federal level repeatedly directed attention to the eligibility criteria and explained in considerable detail how comparisons of poverty concentrations should be made.[51]

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[48] 45 C.F.R. § 116.17(b) (1966) provided that attendance areas with numbers or percentages of children from low-income families which were at least as high as the district-wide average were eligible to be designated as project areas, and that "[o]ther areas with high concentrations of children from low-income families may be approved as project areas but only if the State agency determines that projects to meet the most pressing needs of educationally deprived children in areas of higher than average concentration have been approved and adequately funded."

[49] The language quoted in the preceding footnote was removed by 32 Fed. Reg. 2742, 2744 (February 9, 1967) and never reappeared. *See* 45 C.F.R. § 116.17(d) (1968).

[50] Title I Program Guide No. 28, *see Wheeler v. Barrera*, *supra* note 8, issued on February 27, 1967 to Chief State School Officers and State Title I Coordinators by U.S. Commissioner of Education Harold Howe, II, advised (p. 2) that:

> 1. The revised Title I regulations differ from the previous regulations in two important respects regarding project areas:
>
> a. It is no longer permissible to designate as project areas attendance areas with less than average concentrations of children from low-income families.
>
> . . . .
>
> 2. The purpose of the "attendance area" requirement in Title I is to identify the "target population" from which the children with special needs are to be selected.

[51] For example, Title I Program Guide No. 44, issued March 18, 1968 by Commissioner Howe to Chief State School Officers and state Title I coordinators, collected in one document the "Revised Criteria for the Approval of Title I, ESEA Applications from Local Educational Agencies." Section 1 of that document elaborated upon the Title I regulations with practical instructions about how

. . . .

Thus, far from creating a situation of injustice, the eligibility restrictions were designed to insure that the

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to collect data and make the necessary attendance area comparisons to determine eligibility.

On November 20, 1968, Commissioner Howe distributed Program Guide No. 48, entitled "Improving the Quality of Local Title I Compensatory Education Programs." In that directive, the Commissioner emphasized the need to make wise use of the limited funds available for effective compensatory programs:

> Many Title I programs are based on the selection of individual children from many grade levels from *all* of the *attendance areas* which are technically eligible to be included in the Title I program. This approach has usually resulted in programs which are not as effective as they might be. . . .
>
> The purpose of this memorandum is to suggest an approach to the planning of Title I programs which can result in improved program quality. This approach includes the following major steps:
>
> 1. Focus resources on a number of children in the "target population"—those in the most impoverished school attendance areas;

Id. at 1, 2 (emphasis in original). Finally, in the Title I Program Guide No. 45A, issued July 31, 1969 by Associate Commissioner Leon Lessinger, Chief State School Officers and Title I Coordinators were advised:

> Your title I, ESEA, offices are now in the process of reviewing and approving applications for grants from the fiscal 1970 appropriation (advance funding). A number of State educational agencies have already made special efforts to insure high quality programs that meet all legal requirements. Information reaching this office concerning the administration of Title I indicates, however, that in some cases further efforts are likely to be required if charges of noncompliance with Federal program requirements are to be avoided.
>
> . . . .
>
> In reviewing Title I proposals the SEA should be particularly alert to the following indications of violations of basic Title I requirements:
>
> . . . .
>
> 1. The applicant proposes to provide Title I services to children who do not reside in areas determined to be eligible for Title I, ESEA, services.

. . . . [Continued]

expenditure of Title I funds actually provided some benefits to the students who participated in the compensatory programs, rather than being just "a drop in the bucket"—and the importance of these criteria was repeatedly brought to the notice of state education officials.[52]

Supplanting. Although the Title I statute, in its original 1965 formulation, contained no explicit "anti-supplanting" language, it did limit the use of grant funds to projects designed to meet the "special educational needs of educationally deprived children,"[53] which the Congress understood to incorporate the notion that Title I expenditures should supplement local programs.[54] Accordingly, from the outset the Title I regulations included a prohibition against supplanting.[55] By 1968, six years before the Kentucky expenditures at

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[51] [Continued]

> Each SEA should adopt a plan and schedule visits for monitoring local Title I programs. In checking on local program operations the SEA should take appropriate action if there is any evidence indicating violations, such as the following:
>
> 1. Use of Title I funds in areas not designated as eligible Title I areas.

[52] It is not without significance, in this connection, that the Newark, New Jersey school system apparently had little difficulty in correctly identifying eligible schools in the school year following those for which the auditors noted misexpenditures. *See* N.J.J.A. at 26 (Final Audit Report).

[53] Pub. L. No. 89-10, § 2 [adding § 205(a)(1)(A)], 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (codified at 20 U.S.C. § 241e(a)(1)(A) (Supp. IV 1968)).

[54] *See, e.g.*, 111 Cong. Rec. 7353 (daily ed., April 9, 1965) (Sen. Morse, floor manager) ("I wish to clarify [the permitted use of Title I funds] as a matter of legislative history. . . . The funds in Title I must be used to help the educational needs of educationally deprived children, not to remove any State responsibility from any State in providing education for its children").

[55] *See* 45 C.F.R. § 116.17(f) (1966).

issue here, the regulatory language referred unmistakably to providing a fair share of state and local resources to *participating children*, as well as *project areas*.[56] As in the case of eligibility criteria, federal authorities explained the implications of the non-supplanting requirement with great specificity and clarity.[57]

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[56] *See* 45 C.F.R. § 116.17(h) (1968):

> Each application for a grant under Title I of the Act for educationally deprived children residing in a project area shall contain an assurance that the use of the grant funds *will not result in a decrease in the use for educationally deprived children residing in that project area* of State or local funds which, in the absence of funds under Title I of the Act, would be made available for the project area and that *neither the project area nor the educationally deprived children residing therein will otherwise be penalized* in the application of State and local funds because of such a use of funds under Title I of the Act.

(emphasis supplied.) *See also* Program Guide No. 44, *supra* note 51, § 7.1 ("It is expected that services provided within the district with State and local funds will be made available to all attendance areas *and to all children* without discrimination") (emphasis supplied).

[57] Title I Program Guide No. 48, issued November 20, 1968 by Commissioner Howe, explicitly covered the sort of situation which developed in the 50 Kentucky school districts in 1974 and indicated that a contribution of state or local funds would be required to avoid supplanting:

> 3. Design a comprehensive program that will meet the most pressing needs of each child in the priority groups, utilizing all available local, State and Federal resources;
>
> . . . .
>
> As indicated in item 3 above, the entire school program in the project for the disadvantaged children involved. *State and local funds would then be used to pay for that portion of the program which would replace the pre-existing regular school program and Title I funds would be used to pay for additional services above that level.*

Id. at 2 (emphasis supplied). Separate Program Guides and memoranda were issued by the Commissioner explaining the comparability requirement, *see supra* note 39 & accompanying text.

Nevertheless, the occurrence of supplanting was widespread in the early years of the Title I program, a fact that was brought to the attention of the Congress by both the U.S. Office of Education and outside groups.[58] As a result, in 1970 specific language prohibiting supplanting was added to the statute itself. That language referred to the continuation of state and local spending "for the education of pupils participating in programs and projects assisted under this title."[59] While we think that that language, standing alone, is sufficiently definite and precise to have put Kentucky on notice of the impropriety of the "readiness class" expenditures, *see supra* p. 20, there simply could be no misunderstanding of its significance in light of the substantial attention given to the concept throughout the history of the Title I program. For the same reason, it is obvious that the Secretary's interpretation of the statutory and regulatory non-supplanting language which was applied to the Kentucky audit was no *post hoc* reading, as the Court of Appeals seemed to suggest.[60]

In both these cases, then, not only is the Secretary's interpretation of the statute and regulations amply supported by the language and legislative history, but the states received repeated and specific notice of that interpretation long before the events that produced the audit exceptions.

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[58] *See* S. Rep. No. 634, 91st Cong., 2d Sess. 9, *reprinted in* 1970 U.S. Code Cong. & Ad. News 2768, 2776, referring to Washington Research Project, et al., *Title I of ESEA: Is It Helping Poor Children?* (1969).

[59] Pub. L. No. 91-230, § 109(a), 84 Stat. 121, 124, *reprinted in* 1970 U.S. Code Cong. & Ad. News 133, 137 (codified at 20 U.S.C. § 241e(a)(8) (1970)). *See also supra*, text at note 39.

[60] *See supra* note 42.

CONCLUSION

For the foregoing reasons, *amicus* respectfully suggests that the judgments of the Court of Appeals for the Third and Sixth Circuits in these matters should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, in reviewing an agency audit of federal grant funds expended in 1970-72, a court should apply substantive requirements included in legislation governing federal grants during the period 1978-83 rather than the substantive requirements of the law under which the grants at issue were awarded.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2064

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 724 F.2d 34. The prior opinion of the court of appeals (Pet. App. 6a-31a) is reported at 662 F.2d 208. The decision of the Education Appeal Board (Pet. App. 32a-58a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 60a-61a) was entered on December 27, 1983, and a petition for rehearing was denied on February 17, 1984 (Pet. App. 62a). On May 3, 1984, Justice Brennan extended the time for filing a petition for

a writ of certiorari to and including June 16, 1984. The petition was filed on June 15, 1984, and was granted on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

20 U.S.C. (1976 ed.) 241e(a) provided in pertinent part:

> A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—
>
> (1) that payments under this subchapter will be used for * * * programs and projects * * * (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families * * *.

20 U.S.C. 2732(a)(1) provides in pertinent part:

> [A] local educational agency shall use funds received under this subchapter in school attendance areas having high concentrations of children from low-income families (hereinafter referred to as "eligible school attendance areas") * * *. A local educational agency may designate any school attendance area in which at least 25 per centum of the children are from low-income families as an eligible school attendance area if the aggregate amount expended under this subchapter and under a State program meeting the requirements of section 2751(c) of this title in that fiscal year in each school attendance area of that agency in which projects assisted under this subchapter

> were carried out in the preceding fiscal year equals or exceeds the amount expended from those sources in that area in such preceding fiscal year.

45 C.F.R. 116.17(d) (1972) provided:

> A school attendance area for either a public elementary or a public secondary school may be designated as a project area if the estimated percentage of children from low-income families residing in that attendance area is as high as the percentage of such children residing in the whole of the school district, or if the estimated number of children from low-income families residing in that attendance area is as large as the average number of such children residing in the several school attendance areas in the school district. In certain cases, the whole of a school district may be regarded as an area having a high concentration of such children and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district.

STATEMENT

This case involves expenditures of federal grant funds in Newark, New Jersey in the school years 1970-71 and 1971-72. The statutory and factual background is summarized in this Court's opinion in *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 1-3.

1. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (1976 ed.) 241a *et seq.*, and its successor program, Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, provide federal grants-in-aid to

improve the educational opportunities available to disadvantaged children. "Local educational agencies obtain federal grants through state educational agencies, which in turn obtain grants from the Department of Education upon providing assurances to the Secretary that the local educational agencies will spend the funds only on qualifying programs." *Bell* v. *New Jersey*, slip op. 1-2 (footnotes omitted). The purpose of the programs is to provide special educational services—typically remedial reading and math and English as a second language—to educationally disadvantaged children in low-income areas. H.R. Rep. 95-1137, 95th Cong., 2d Sess. 4, 6 (1978).

One of the principal congressional concerns with the Title I program has been to ensure that federally-funded services reach "areas which have the highest proportions of children from low-income families." S. Rep. 95-856, 95th Cong., 2d Sess. 7 (1978); H.R. Rep. 95-1137, *supra*, at 5. Accordingly, Congress enacted detailed provisions governing both the allocation of federal Title I funds among school districts and the suballocation of those funds among schools and students within each district. Federal funds were allocated among school districts on the basis of the number of low-income children residing in each district, and the state per-pupil expenditure. 20 U.S.C. (1976 ed.) 241c.[1] The local school districts, in turn, were permitted to expend the funds only on behalf of children who were "educationally deprived" —that is, who performed at a level below normal for their age (see 45 C.F.R. 116.1(i) (1972))—and who lived in an area that had a high concentration of

[1] There is no dispute in this case that the Newark school district received its correct allocation of Title I funds.

children from families with incomes below the poverty level. 20 U.S.C. (1976 ed.) 241e(a).

Title I appropriations have never been sufficient to provide services to all eligible students. H.R. Rep. 95-1137, *supra*, at 7. Rather than diffuse the limited funds by providing less than adequate services to all eligible children, the policy of the Act has been to concentrate services on a smaller number of children, serving them more fully. See 20 U.S.C. (1976 ed.) 241e(a)(1)(B) (Title I projects had to be of "sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting [the special educational] needs" of the children served).

Office of Education[2] regulations in effect in 1970-72 established a comparative test for determining which school attendance areas within a school district were eligible for Title I projects: a school attendance area could receive Title I funds if either the percentage or the number of low-income children residing in the area was at least as high as the district-wide average. Alternatively, the entire school district could be designated as eligible for Title I services, but only if there were little variance in the concentrations of low-income children among school attendance areas within the district. 45 C.F.R. 116.17(d) (1972). Whatever the method chosen, the area designated for Title I services had to "be sufficiently restricted in size in relation to the nature of the project as to avoid jeopardizing its effectiveness in meeting the

[2] Prior to May 4, 1980, the Office of Education of the Department of Health, Education, and Welfare was the federal agency responsible for administration of Title I. After that date, those responsibilities were assumed by the Department of Education. See 20 U.S.C. 3411, 3441.

aims and objectives of the project." 45 C.F.R. 116.17 (c) (1972).

The effect of these regulations was to concentrate the limited Title I funds in the poorest areas of each school district, even though an ineligible area in one of the more disadvantaged districts in a state might well be needier than an eligible area in a wealthier district. For example, a school attendance area in Newark with 32% of its children from families under the poverty line would have been ineligible for Title I services in 1970-72 (since Newark's district-wide percentage was 33.9%); yet an area with that percentage of low-income children might well have been eligible had it been located in other, less disadvantaged, districts in the State.

In subsequent years, the standards for selecting eligible school attendance areas have changed many times. In 1976, the Office of Education modified its regulations to permit school attendance areas with more than 30% of their children from families below the poverty line to be considered eligible for Title I services, under certain conditions, even though the district-wide percentage might exceed 30%. 45 C.F.R. 116a.20(b)(2) (1977).[3] Then, in 1978, Congress lowered this percentage to 25%. At the same time, Congress restricted use of this alternative standard to situations in which the local school district could guarantee that each eligible attendance area receiving Title I services in the preceding year (*i.e.*, those areas with percentages of low-income children at or above the district-wide average that actually had

[3] Attendance areas could be so treated only upon "specific request" by the local school district and approval by the state. 45 C.F.R. 116a.20(a) and (b)(2) (1977).

Title I projects) would continue to receive as much or more state and federal compensatory education funding as the area had received the previous year. 20 U.S.C. 2732(a)(1). In other words, under this "maintenance of effort" proviso, Title I funds could be spread among more areas, where 25% or more of the families were below the poverty line, but only if the resources available to the neediest areas were not thereby reduced. As will be explained in greater detail below, it is this provision that the court of appeals applied retroactively to this case.

In 1981, the Department of Education promulgated a regulation interpreting 20 U.S.C. 2732(a)(1) to permit calculation of the "maintenance of effort" proviso on the basis of per-pupil expenditures rather than aggregates. 34 C.F.R. 201.51(d)(ii) (1981). Later in 1981, Congress passed the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, which, among many other changes in Title I, superseded the eligibility standards of 20 U.S.C. 2732(a)(1) and replaced them with the following (20 U.S.C. 3805(b)):

> the programs and projects described [in the school district's application to participate in the program must]—
>
> (1)(A) [be] conducted in attendance areas of such [local school district] having the highest concentrations of low-income children;
>
> (B) [be] located in all attendance areas of [a local school district] which has a uniformly high concentration of such children; or
>
> (C) [be] designed to utilize part of the available funds for services which promise to provide significant help for all such children served by such [local school district].

No provision for eligibility of areas with at least 25% concentrations of low-income children (as in the 1978 standards) was included in the 1981 legistion. Department of Education regulations interpreting the 1981 Act also omitted the prior 25% rule. 34 C.F.R. 200.49 (1983).

Finally, in December 1983, Congress amended Chapter 1 to permit school districts to designate any attendance area with at least a 25% concentration of low-income families as a Chapter 1 project. Pub. L. No. 98-211, § 3, 97 Stat. 1413 (to be codified at 20 U.S.C. 3805(d)). Unlike the 1978 Act, however, the 1983 Act did not attach any "maintenance of effort" limitation to this provision. *Ibid.*

2. As a condition to receiving Title I funds for the 1970-72 school years, respondent was required to give assurances that its Title I funds would be spent only for services that satisfied all the applicable requirements, including the school attendance area eligibility standards just discussed. Title I provided (20 U.S.C. (1976 ed.) 241f(a)) that "[a]ny State desiring to participate [in the program] * * * shall submit through its State educational agency * * * an application." The application had to contain "satisfactory assurance" that Title I funds "will be used only for programs and projects which have been approved by the State educational agency * * * and which meet the applicable requirements" of Title I, specifically including the attendance area eligibility standards of Section 241e(a). 20 U.S.C. (1976 ed.) 241f(a)(1). See also 20 U.S.C. (1976 ed.) 241e (requiring local school districts to file applications with state educational agencies, including assurances that they would comply with all applicable Title I requirements).

Title I regulations further specified that state grantees had to provide an assurance that they would "comply with the requirements of Title I of the Act and the regulations in subpart C [which included 45 C.F.R. 116.17(d)]" and that they would require each local school district "to carry out all assurances given by it * * * and * * * perform all obligations imposed on it." 45 C.F.R. 116.31(c) (1972).

3. A federal audit of the New Jersey Title I program for the school years 1970-71, 1971-72, and 1972-73 was completed in 1975. See J.A. 9-51. The auditors concluded that the Newark Board of Education had used Title I funds totalling over $1.1 million in 1970-72 in school attendance areas that did not satisfy the eligibility requirements of the Title I regulations. *Id.* at 14. The auditors also determined that Newark had made proper eligibility determinations for 1972-73. *Id.* at 15.

The principal issue in the audit was the city's method for calculating eligibility of school attendance areas in 1971-72.[4] As explained in the Title I Program Guide No. 44, issued to Chief State School Officers on March 18, 1968 (J.A. 17), a school district could use one of the two methods for calculating the percentage of low-income children in a school attendance area: the district could make its calculations on the basis of children *eligible* to attend the public schools involved, or on the basis of the children actually *attending* those schools, depending on whether the attendance areas had well-defined geographical boundaries. The program guide suggested various sources of income data that could be used—recom-

[4] Because of the statute of limitations, only $1,674 remains at issue from the 1970-71 school year (Pet. App. 36a-37a).

mending especially Aid to Families with Dependent Children and School Lunch Program statistics—but stressed that, whatever data base was used, it had to be used uniformly throughout the district. J.A. 17.

The Newark Board of Education computed a ratio of the total number of AFDC-eligible children enrolled in all schools (elementary, junior, and senior high) within each elementary school attendance area to the enrollment of the elementary school in question. This had the effect of substantially overstating the percentage of low-income children in the school, since the numerator of the ratio included low income children of all ages while the denominator included only children of elementary school age. See J.A. 21-22. Newark used "a different (and also incorrect) method to compute the low-income percentages for the junior and senior high schools . . . by averaging the low-income percentages of the 'feeder or pipe-line' elementary schools" (Pet. App. 45a; see J.A. 23-24). Low-income children were thus double-counted in the calculations for individual school attendance areas at all grade levels; those improperly computed ratios were then compared to a proper calculation of the district-wide percentage of low-income children (33.9%). Pet. App. 42a-45a. In subsequent proceedings before the Education Appeal Board, the State acknowledged (*id.* at 45a):

> The flaw in the initial formula was that it tended to inflate the low-income percentages in attendance areas in that its numerator consisted of all low-income students in an area while its denominator described only elementary school enrollment.

Correcting Newark's calculations, the auditors found that ten elementary and three secondary schools

deemed eligible by the city had in fact been ineligible. The result was that $1,029,630 in Title I funds were improperly spent during the 1971-72 school year. J.A. 25. On June 11, 1976, the Deputy Commissioner for the Bureau of Elementary and Secondary Education issued a final determination letter to respondent demanding repayment of the misspent funds. J.A. 52-58.

Respondent appealed the Deputy Commissioner's determination to the Title I Audit Hearing Board. Respondent contended, inter alia, that the Commissioner (now Secretary) of Education was without authority to compel repayment of Title I funds improperly spent, that under certain recalculations many of the schools deemed ineligible by the audit report were in fact eligible, and that the whole of the Newark district could have been designated as a Title I project area. Respondent did not contend that the city's original computations were correct (Pet. App. 36a, 40a).[5] Nor did respondent contend that the revised eligibility standards adopted by the Office of Education in 1976 (see page 6, *supra*) or by Congress in 1978 (see pages 6-7, *supra*) should be applied to the case, even though both changes were made before the Board heard oral argument on the appeal.

In a decision rendered February 19, 1980, the successor Education Appeal Board rejected each of respondent's arguments (Pet. App. 32a-58a). The Board first concluded that the Commissioner was authorized to compel repayment of misspent funds—a

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[5] Indeed, at oral argument before the Board, respondent stated that the recalculations "are in fact an acknowledgment of the fact that there were irregularities in the original grant approval process" (Pet. App. 46a (citation omitted)).

position ultimately affirmed by this Court in *Bell* v. *New Jersey, supra.* The Board then turned to respondent's proposed recalculations of low-income percentages for the 1971-72 school year. Under these revised calculations, respondent's liability for misspent funds would have been reduced to $18,779 (respondent's calculation) or $342,657 (Deputy Commissioner's calculation). Pet. App. 46a.

While expressing doubts that respondent's post hoc recalculations could properly be considered germane to the appeal,[6] the Board rejected them on the merits. Respondent's proposed revised method of calculation would have compared the total number of low-income children within an attendance area (regardless of age) to the total number of children eligible to attend public school in the attendance area in question (regardless of age). Pet. App. 50a-51a. The Board concluded that this method overstated the low-income percentages for elementary schools because the junior and senior high school cohorts had significantly higher concentrations of low-income children.[7] "By building the junior and senior high school enrollments * * *

---

[6] The Board observed (Pet. App. 48a) that Title I "auditors could not conduct an effective audit if the grantees were permitted, years after the funds had been spent, to use new methods for computing attendance area eligibility." In light of its conclusion that the recalculations themselves were substantively improper, however, the Board found it unnecessary to decide whether to reject respondent's argument on this ground. *Id.* at 49a.

[7] The percentage of low-income enrollment for the ten elementary schools in question was 23.8%, while the percentage of low-income enrollment for the junior and senior high schools included in respondent's recalculations were 50.9% and 35.2%, respectively. Pet. App. 52a.

into the ratio," the Board found (*id.* at 53a), "New Jersey inflated the elementary school low-income percentages so that eight of the ten originally disqualified schools became qualified. New Jersey's method of recalculation is unacceptable."

The Board also rejected respondent's contention that "the whole of the Newark school district could have been considered educationally disadvantaged so as to be a Title I area" (Pet. App. 54a (citation omitted)). As noted above, at the time of Newark's application for the 1971-72 school year, Title I regulations provided (45 C.F.R. 116.17(d) (1972)):

> In certain cases, the whole of a school district may be regarded as an area having a high concentration of [children from low-income families] and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district.

Respondent contended that Newark would have qualified as a Title I project area under this provision.

The Deputy Commissioner opposed this position, contending: (1) that, since the city had not applied to be treated as eligible under this provision, it was irrelevant whether, had it done so, it might have qualified, and (2) that, since Newark's application showed a very wide variance in low-income percentages, from a high of 84.7% to a low of 10%, it would not have qualified for treatment as a Title I project area under the regulation. Pet. App. 56a-57a. The Board agreed (*id.* at 57a), and accordingly ordered respondent to repay $1,674 for 1970-71 and $1,029,630 for 1971-72 (*id.* at 58a).

The Secretary declined to review the Board's order, which accordingly became final (Pet. App. 59a).

4. Respondent petitioned for judicial review in the United States Court of Appeals for the Third Circuit (J.A. 93), challenging both the Secretary's authority to require recoupment and the validity of the administrative determination that the funds had been misspent. The court of appeals agreed with respondent's argument on the Secretary's recoupment authority and therefore did not consider the alternative claim on the merits (Pet. App. 6a-31a). This Court reversed in a unanimous opinion. *Bell* v. *New Jersey*, *supra*. The Court "conclude[d] that the Secretary has followed the proper procedures. He has administratively determined the amount of the debt owed by [respondent] to the Federal Government * * * as he is empowered to do" (slip op. 18-19). The Court remanded the case to the court of appeals for consideration of respondent's objections to the merits of the Secretary's determination (slip op. 19).

On remand, respondent contended for the first time that its compliance should be tested by the standards contained in the 1978 reauthorization of Title I (see pages 6-7, *supra*), rather than by the standards that were in effect when respondent agreed to comply with them and the funds were furnished.[8] The 1978 standards permitted the use of grant funds in school attendance areas "in which at least 25 per centum

[8] Although the court of appeals acknowledged that appellate courts do not generally consider issues that have not been passed on by the agency or court whose decision is under review, it concluded that an exception to this rule was appropriate here because the issue is one "of national importance, which is singularly within the competence of appellate courts and is not predicated on complex factual determinations" (Pet. App. 3a-4a n.1).

of the children are from low income families * * * if the aggregate amount expended under [Title I] and under a [qualifying] State program * * * in that fiscal year in each school attendance area of that [local school district] in which projects assisted under [Title I] were carried out in the preceding fiscal year equals or exceeds the amount expended from those sources in that area in [the] preceding fiscal year" (20 U.S.C. 2732(a)(1)). Respondent asserted that, if tested by this more lenient standard, most of the 1970-72 Newark expenditures would be allowable.

The court of appeals agreed that the eligibility standards contained in the 1978 reauthorization legislation should be applied to the 1970-72 grant fund expenditures, on the theory that "[a] federal court or administrative agency must 'apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary'" (Pet. App. 4a, quoting *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974)). Finding no such manifest injustice or contrary statutory indication, the court concluded that retroactive application of the 1978 standards was appropriate, particularly because those changes were assertedly "remedial," and the case "involves a public matter of great national concern * * * [rather than] the routine private lawsuit in which a retrospective application of a law would disadvantage a private party who had relied on a settled body of private law" (Pet. App. 4a-5a). The court accordingly remanded the case to the Secretary to determine, for the disputed school attendance areas, whether the 1970-72 expenditures conformed to the 1978 standards.

SUMMARY OF ARGUMENT

The Title I program was reauthorized in 1978, just as it was again reauthorized, under a different name (Chapter 1 of the Education Consolidation and Improvement Act), in 1981. In each instance, Congress conducted extensive hearings and investigations into the operation of the program and adopted numerous changes designed to make the program achieve its objectives more effectively. The court of appeals, when reviewing an audit of Title I expenditures made in the school years 1970-71 and 1971-72, concluded that one of the 1978 changes in program requirements (a modification in school attendance area eligibility standards) must be applied retroactively to the 1970-72 audits. The court reached this somewhat startling conclusion on the basis of a supposed presumption in favor of retroactive application of statutory amendments, purportedly strengthened in this case by assertions that the 1978 reauthorization legislation was "remedial" in nature and that the case involves "a public matter of great national concern" litigated on appeal by "two public agencies." Pet. App. 4a-5a.

We submit that the court of appeals' retroactivity analysis is fundamentally flawed—indeed, that every relevant consideration points toward a purely prospective application of the 1978 Title I program requirements.

First, the court of appeals disregarded the contractual nature of respondent's assurances in 1970 and 1971 that it would comply with and enforce all Title I program requirements applicable to its grants. Viewed as a contract, it is not remotely plausible to construe the assurances as incorporating future changes in law. Neither respondent nor the federal

government would ever have agreed to allow their legal rights and obligations to fluctuate with subsequent changes in congressional or administrative policy. And the conduct of the parties confirms that their contemporaneous understanding of the Title I grant agreement was that it embodied the program requirements of the day. As Justice White noted in the prior decision in this case, *Bell* v. *New Jersey*, slip op. 2 (concurring opinion), the states have "no legitimate claim" to be able to breach these "contractual-type agreements" with impunity.

Second, the court of appeals virtually ignored clear indications of congressional intent that the 1978 legislation apply only prospectively. The statute itself specified that it would apply to grants beginning in fiscal year 1978. Canons of construction applied by the Comptroller General, statements in the legislative history, and the general savings clause, 1 U.S.C. 109, all confirm this understanding.

Third, the court of appeals misunderstood the correct retroactivity presumption applicable to substantive legislation of this sort. The court purportedly relied on language in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), but failed to honor the exceptions and limitations discussed in that opinion and reflected in numerous decisions by this Court. In the absence of unambiguous indications of congressional intent, statutes affecting substantive rights or obligations are considered prospective only. This case clearly falls into that category—not into the category of cases involving procedures, remedies, or prospective relief, where this Court has treated statutory changes as applying to pending cases.

Fourth, the court of appeals' implicit judgment that it would be bad policy to hold respondent accountable for misspent funds in a case of this nature is contrary to congressional intent, as explored in *Bell* v. *New Jersey*, slip op. 8-16. The judgment below would have a devastating effect on the federal government's ability to enforce the terms and conditions attached to federal grant programs.

ARGUMENT

IN REVIEWING A DETERMINATION OF AUDIT DEFICIENCIES IN A FEDERAL GRANT PROGRAM, A COURT SHOULD APPLY THE SUBSTANTIVE STANDARDS OF THE LAW UNDER WHICH THE GRANTS WERE MADE

In 1970 and 1971, respondent applied for and received substantial grants of federal funds for the 1970-72 school years, expressly on the condition—solemnized by written assurances—that it would comply with all Title I requirements, including requirements regarding eligibility of school attendance areas. The books for that school year closed, and in due time federal auditors discovered that the Newark School Board had spent approximately $1.1 million to provide services to children in schools that were not eligible for them under the standards then in effect.

In the succeeding years, the standards for determining eligible school attendance areas were modified many times. After remaining unchanged from 1967 through 1976, the standards were modified by the Commissioner of Education in 1976, by Congress in 1978, by the Secretary of Education in 1981, by Congress also that same year, and again by Congress in 1983. The question before the Court is: which standards should auditors and reviewing courts apply in

assessing the legality of respondent's program operations in 1970-72? We submit that they should apply the standards in effect at the time.

A. The Obligations And Conditions Of A Voluntary Contractual Grant Program Between The Federal Government And A Grantee Are Fixed As Of The Time Of The Grant Agreement

Like other federal grant-in-aid programs, Title I was (and Chapter 1 is) based on the concept of "cooperative federalism." See *King* v. *Smith*, 392 U.S. 309, 316 (1968). Participation in the program by the state grantees was purely voluntary, but in choosing to participate, a grantee committed itself to abide by the terms and conditions prescribed by Congress (or, through delegation of authority, by the Secretary or the Commissioner). *Id.* at 316-317. See pages 8-9, *supra* (describing assurances required of respondent). The Title I program was, therefore, "much in the nature of a contract: in return for federal funds, the States agree[d] to comply with federally imposed conditions." *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981).[9]

Justice White aptly characterized the nature of respondent's legal obligation in his concurring opinion in this Court's prior decision in this case, *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 2:

> The States enter into contractual-type agreements with the United States to disburse the [Title I] monies in accordance with specified conditions. The States had no legitimate claim to a right to be able to breach these agreements

[9] Although Title I involves only state grantees and local school district sub-grantees, the principles of this case apply equally to any federal grantee, public or private.

with impunity. In the absence of any contrary congressional intent, agreements such as these are surely enforceable.

The question in this case, therefore, is not so much what *law* to apply, but what did the contract between respondent and the federal government in 1970-72 mean.

Viewed as a contract, it is quite obvious that respondent's assurances incorporated the Title I requirements as they existed at the time. Neither respondent nor the federal government could reasonably be thought to have agreed to terms and conditions that would not be enacted until some six years after all activities under the contract had been completed. The legitimacy of Congress's imposition of terms and conditions on the Title I program depended on whether the states could "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17 (citations omitted). And there could have been no "knowing acceptance" of those terms by respondent if—as would be the case if the commitment referred to future law rather than current law—the State were "unable to ascertain what [was] expected of it." *Ibid.* It is inconceivable that, when respondent and the Commissioner of Education executed this contract in 1970-72, they intended respondent's performance of its obligations to be measured by standards not yet enacted—to be determined by the fortuity of when respondent's petition for review of the Commissioner's determination of deficiencies, if any, might be heard.

Moreover, the plain terms of the State's required assurances and the nature of its obligations preclude any possibility that future legislative changes were expected to apply retroactively. The assurance required under 20 U.S.C. (1976 ed.) 241f(a) stated that the Title I funds would be used only for programs and projects that met the applicable requirements of Section 241e(a), *i.e.*, the attendance area eligibility requirements, among others. The assurance did not state that the programs and projects would meet the requirements of Section 241e(a) *as they might subsequently be amended.*[10] If the parties had intended their rights and obligations under the contract to fluctuate according to future changes in law, they surely would have said so.

By its assurances, respondent also undertook an enforcement responsibility, the duty to screen local applications and oversee local operations to ensure that Title I funds would be used only for programs and projects that satisfied the requirements of Section 241e(a). See 20 U.S.C. (1976 ed.) 241f(a)(1)). The pertinent question now must be whether respondent complied with its commitments as they were understood at that time. It makes nonsense out of those assurances to allow respondent to excuse its failure to enforce compliance with Section 241e(a) on Congress's later decision to amend the law.

The conduct of the parties to the contract also casts light on the contemporaneous understanding of its meaning. If, as respondent now contends, the assurances it provided were understood to incorporate subsequent amendments to the Title I standards, then respondent would have litigated this case on that un-

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[10] Similarly, the assurance under the Title I regulations required that the State comply with the requirements in subpart C of the regulations, which included the specific regulatory provision at issue (45 C.F.R. 116.17(d) (1972))—and not future revisions to those regulations. See 45 C.F.R. 116.31(c) (1972).

derstanding. The standards for determining school attendance area eligibility first changed in September 1976, and according to respondent (see Supp. C.A. Br. 14-15. n.*), under those revised standards, respondent's liability would have dropped from $1.1 million to about $470,000. Yet respondent's application for review of the final audit determination, filed on October 21, 1976 (J.A. 59), relied exclusively on the prior Title I standards; nowhere in its application did respondent suggest that revisions in the standards might have affected its obligations. See page 11, *supra*. Nor did respondent rely on the 1976 regulations in subsequent proceedings before the Board. In 1978, Congress again changed the standards. Under those standards (assuming it otherwise satisfied the statutory criteria), respondent's liability would have fallen to about $248,000 (according to respondent's figures, see Nov. 10, 1983 letter to the clerk of the court of appeals, at 2). Again, however, respondent made no claim at the time that the new standards should apply.

Respondent's current argument is no more than a post hoc rationalization; at the time of the contract and for some ten years thereafter, respondent understood its assurances to refer to the 1970-72 standards. That contemporaneous understanding, which is consistent with the terms of the assurances, with the views of the agency charged with enforcement of the grant conditions, and with common sense, should govern the interpretation of this contract.[11]

[11] Other courts of appeals have consistently analyzed federal grantees' compliance with the terms of their grant agreements by reference to the standards in effect at the time the grants were made. See, *e.g.*, *Indiana* v. *Bell*, 728 F.2d 938, 941 n.6 (7th Cir. 1984) (Title I); *North Carolina Comm'n of Indian Affairs* v. *Dep't of Labor*, 725 F.2d 238, 239 (4th Cir. 1984) (CETA); *Woods* v. *United States*, 724 F.2d 1444, 1446 n.1 (9th Cir. 1984) (Food Stamps); *Kentucky* v. *Secretary of Education*, 717 F.2d 943, 945, 947 n.9 (6th Cir. 1983), cert. granted, No. 83-1798 (Oct. 1, 1984) (Title I); *West Virginia* v. *Secretary of Education*, 667 F.2d 417, 420 (4th Cir. 1981) (Title I).

This is not to say that a subsequent Congress would lack the power to relieve a grantee of the *consequences* of having violated its assurances. Such a course might well make sense if a subsequent Congress believed that the terms and conditions then imposed were unfair.[12] However, neither respondent nor the court of appeals has suggested that 20 U.S.C. 2732(a)(1), or any other statute, is an exercise of this forgiveness power. We will address the meaning of Section 2732(a)(1) in detail below; for present purposes it suffices to note that nothing in the language or legislative history even remotely indicates an intention to interfere with remedies for past violations.

[12] Indeed, the House of Representatives passed a bill that would have required the Secretary to apply the provisions of 20 U.S.C. 2732(a)(1) retroactively to any audit determinations of pre-1978 expenditures now pending. H.R. 11, 98th Cong., 2d Sess. § 808(a)(4) (1984); see 130 Cong. Rec. H7903 (daily ed. July 26, 1984). The provision was deleted from the legislation in conference. See H.R. Rep. 98-1128, 98th Cong., 2d Sess. 53-54 (1984); see 130 Cong. Rec. H10756 (daily ed. Oct. 2, 1984). Had the provision been enacted, the effect would have been to relieve states of the obligation to repay misspent funds. It would not, of course, have had any bearing on whether respondent or other states in fact complied with the assurances they had given in prior years.

B. The 1978 Act, By Its Terms And Legislative History, Was Intended To Be Prospective Only

The question of prospectivity or retroactivity of legislation (constitutional considerations aside) is one of statutory construction. This Court has often addressed the factors to be considered when a statute, together with its legislative history, does not expressly indicate whether it was intended to be applied to conduct that has already taken place. See pages 33-41, *infra*. But "[w]here Congress has expressly provided, or the legislative history had indicated, that legislation was to be given only prospective effect, the courts * * * generally have followed that lead." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 715-716 n.21 (1974). In such a case, there is no call to consult presumptions or canons of construction. Congress has spoken.

The court of appeals was therefore in error when it held that substantive provisions of the 1978 Title I reauthorization legislation were intended to be applied retroactively to govern judicial review of audit determinations concerning grants made pursuant to prior law. The court's statement (Pet. App. 4a) that "nothing in the 1978 amendments or the legislative history indicates that the amendments were not intended to be applied retroactively" is simply unfounded.

The intention of Congress in this regard could hardly be clearer. The 1978 legislation expressly provided (20 U.S.C. 2702) that "[d]uring the period beginning October 1, 1978, and ending September 30, 1983, the Secretary shall, in accordance with the provisions of this sub-chapter, make payments to State educational agencies for grants made on the basis of entitlements created under this sub-chapter."

See also Pub. L. No. 95-561, § 1530, 92 Stat. 2380 (effective date of 1978 Act would be October 1, 1978).[13] The plain meaning of 20 U.S.C. 2702 is that the substantive standards enacted by the 1978 legislation were to apply to grants between October 1, 1978 and September 30, 1983—and not before.[14] Where, as here, Congress has explicitly provided that the substantive provisions of reauthorization legislation are to apply during a specific, prospective period of time, it is patent misconstruction to apply those provisions to an earlier era.

This accords with the general theory of the law of federal grants. The terms and conditions reflected in grant assurances are "strings" attached to particular grants of money, which are themselves strictly limited as to when they can be spent.[15] The assurances thus embody the conditions a Congress chooses to attach to the monies it expends. The allowability of expenditures under a particular grant must depend on the conditions attached by Congress to *that*

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[13] This Court has held that statutes must be read in light of their stated effectiveness date. *White* v. *United States*, 191 U.S. 545, 553 (1903). Cf. *LTV Federal Credit Union* v. *UMIC Government Securities*, 704 F.2d 199, 202 (5th Cir. 1983) (absence of effective date supports finding that legislative intent concerning retroactivity is ambiguous).

[14] Similarly, prior law (20 U.S.C. (1970 ed.) 241b) had provided that "[t]he Commissioner shall, in accordance with the provisions of this subchapter, make payments to State educational agencies for the period beginning July 1, 1965, and ending June 30, 1973." See also 20 U.S.C. (1976 ed.) 241b (intervening period). There is obviously no conflict between these provisions, and no basis for applying the standards expressly enacted for 1978-83 to grants made during the period 1965-73.

[15] Title I funds were available for a two-year period. 20 U.S.C. (1976 ed.) 1225(b).

grant; it is irrelevant whether subsequent Congresses may decide to alter the conditions attached to *other* grants.

Accordingly, the Comptroller General—the federal official charged with determining the legality of actions taken with regard to the use of public funds—has consistently held that changes in appropriation or authorization statutes must be applied prospectively only. They are not to be applied to expenditures made under prior statutes unless the changes are made retrospective by express language or by necessary implication. Office of General Counsel, GAO, *Principles of Federal Appropriations Law* 2-48 (1982); see, *e.g.*, 62 Comp. Gen. 396, 398 (1983); 38 Comp. Gen. 103, 104 (1958); 28 Comp. Gen. 162, 162 (1948); 16 Comp. Gen. 1051, 1054 (1937). In light of Congress's reliance on the Comptroller General for authoritative advice and interpretation of statutes, principles, and procedures in the area of federal expenditures,[16] his views are entitled to considerable weight in determining congressional intent.

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[16] The Comptroller General, whose tenure in office is largely subject to congressional control (31 U.S.C. 703), is generally considered an "arm of the Congress" in addition to being the federal government's chief fiscal supervisor. Among other responsibilities, the Comptroller General "investigates all matters related to the receipt, disbursement, and use of public money" and advises Congress regarding such matters. 31 U.S.C. 712, 717, 719; see generally *Bowsher* v. *Merck & Co.*, 460 U.S. 824 (1983). Specifically, the Comptroller General is required to report to Congress regarding "expenditures * * * an agency makes in violation of law." 31 U.S.C. 719(c)(1). The Comptroller General is also consulted by Congress when it is considering proposed legislation in areas within his expertise. 31 U.S.C. 719(i)(2). Accordingly, Congress is likely to have drafted legislation within the Comptroller General's purview in light of his canons of construction.

The legislative history confirms this prospective interpretation of the statutory language. The 1978 amendments were part of a general reauthorization and revision of the Title I program. The focus of legislative consideration was on how future Title I grants could be simplified, clarified, and improved. See H.R. Rep. 95-1137, 95th Cong., 2d Sess. 2 (1978); 124 Cong. Rec 15935 (1978) (statement of Rep. Chisholm); *id.* at 27533 (statement of Sen. Byrd). The House Report stated that the changed requirements clarify "the manner in which school districts *are to distribute* Title I funds among eligible schools and children," thus explicitly indicating that the changes were understood to apply prospectively. H.R. Rep. 95-1137, *supra*, at 21.

The amendment with which this case is concerned—affecting school attendance area eligibility standards—reflected a change in policy arising from "a concern that inflexible targeting requirements could force some school districts with very high incidences of poverty to declare school[s] with 20 percent low-income enrollment ineligible, while schools with only 10 percent low-income enrollment or less might be eligible in wealthier neighboring districts." H.R. Rep. 95-1137, *supra*, at 22. The problem arose because Title I was not funded at a level adequate to serve all eligible children, and thus some form of allocation among eligible children had to be adopted. The regulation in place from 1967 to 1976, 45 C.F.R. 116.17(d), attempted to deal with the scarcity of resources by requiring each district to confine its Title I projects to the neediest half of its school attendance areas. When viewed from an intradistrict perspective, the effect of the regulation was consistent with the congressional objective of serving "areas

which have the highest proportions of children from low-income families" (S. Rep. 95-856, 95th Cong., 2d Sess. 7 (1978)). Indeed, any other approach would result in shifting limited resources from needier to less needy areas within the district and diluting Title I programs in the schools with the greatest percentages of low-income children. When viewed on a statewide basis, however, there was an anomaly that an attendance area with a given percentage of children from low-income families would have a greater chance of being designated as an eligible area if it were located in a wealthier, rather than a poorer, district.[17]

Thomas C. Schmidt, Rhode Island Commissioner of Education, summarized the problem as follows, in testimony on behalf of the Education Commission of the States:

> Essentially, [the] process requires a [local school district] to determine the district-wide percentage of economically disadvantaged students. Any school which has a higher incidence of economically disadvantaged students is eligible for Title I funds. * * * Within a school district this is a quite rational means of concentrating Title I money. Within a state it is not consonant with the expressed objective of the legislation for the simple reason that the incidence of low-income students varies enormously among [local school districts] in any given state and as a result there

[17] This effect was mitigated somewhat by the fact that a comparatively more disadvantaged district would receive a correspondingly higher per-pupil allotment of Title I funds. See 20 U.S.C. (1976 ed.) 241c. Because of its high poverty rates, the Newark school district received substantial amounts of Title I funds during the period audited. In 1970-73, Newark received over $28,000,000 in Title I funds—over 18% of the State's allocation. J.A. 14.

> are wide variations in target school levels among districts.

Education Amendments of 1977: Hearings on S. 1753 Before the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 92 (1977) [hereinafter cited as *Senate Hearings*].

Although several witnesses advocated selection of eligible attendance areas on a statewide basis (a proposal that would have caused a major shift in Title I resources from less disadvantaged to more disadvantaged areas within each state),[18] Congress decided instead to lower the threshold for eligibility from the 30% standard in the 1976 regulations to 25%, subject to certain restrictions explained at pages 6-7, *supra*. As 20 U.S.C. 2702 indicates, the new standard was intended to apply to future grants under the reauthorized Title I program. Not one member of Congress or witness before the congressional committees suggested that this new threshold would or should apply to prior grants.[19]

[18] See, *e.g.*, *Senate Hearings*, 94-95 (testimony that all major state education organizations supported state-wide eligibility determinations); *Part 12: National Organization: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 394-395 (1977) (testimony of Ruth Mancuso, Vice President of the National Ass'n of State Boards of Education); *Part 19: Title I—Funds Allocation: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 858-859 (1977) (testimony of Caryl Kline, Secretary of the Pennsylvania Dep't of Education).

[19] The Senate Report characterized the 1978 reauthorization legislation as a "complete rewrite" of Title I. S. Rep. 95-856, 95th Cong., 2d Sess. 130 (1978). Although one of the pur-

Indeed, there was explicit recognition that the need for the change had become apparent only after extensive experience with the program. Pennsylvania's Secretary of Education, for example, testified that the prior regulations "made sense in the early years of the title I program." *Part 19: Title I—Funds Allocation: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 858-859 (1977) [hereinafter cited as *Part 19: House Hearings*]. See also 124 Cong. Rec. 27528 (1978) (comments of Sen. Kennedy) ("[i]n developing the legislative provisions for Title I, the committee was guided by the wealth of research and evaluative information which is now available concerning the program").

Merely because Congress believed the 1978 amendments would make the Title I program more effective in achieving its objectives does not imply that Congress intended the amendments to apply retroactively. The entire legislative history is consistent with the interpretation that Congress intended to improve the program for the future, not to remake the past.

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poses of the legislation was to "clarify and logically structure the present requirements" (*ibid.*), it cannot be argued that the 1978 Act was intended merely to restate or clarify prior law. In some respects, the 1978 Act added new or more stringent requirements. See, *e.g.*, 20 U.S.C. 2735 (parental involvement); 20 U.S.C. 2738 (complaint resolution). With reference to the change in school attendance area eligibility standards, the legislative history does not suggest that the 1978 provision was a mere clarification of prior law; rather, an independent purpose of the 1978 Act was to "insure systematic methods for the distribution of Title I funds by local educational agencies among project areas" (S. Rep. 95-856, *supra*, at 130).

The court of appeals casually disregarded all of this evidence of congressional intent, stating that the legislative history is "replete with evidence that Congress enacted these amendments to correct the injustice that the earlier ineligibility standards worked on areas with high concentrations of low income families" (Pet. App. 4a). Even if accurate, this portrayal of the legislative history would be no substitute for actual indications that Congress intended the 1978 changes to apply retroactively. As we have discussed, all the direct evidence points the other way. But the portrayal is not accurate. The scant discussion of the issue in the mammoth legislative history of the 1978 Act (one substantive discussion in a House Report; fewer than a dozen references by witnesses in some 25 volumes of hearings) contains not one reference to "injustice" or any synonym thereof.[20] Congress

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[20] The court of appeals cited three passages from the House hearings. Pet. App. 4a n.2. The first, *Part 16: Services and Student Development: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Educational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 194-197 (1977), was a tabular response to Rep. Quie's request for data on how often school districts used the alternative provisions of the 1976 regulations (see page 6, *supra*). No opinions were expressd. The second, *Part 18: Administration of Title I of ESEA: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 134-141 (1977), was testimony by the Superintendent of the Baltimore Public Schools that the formula for distributing funds should "remain essentially the same, * * * in accordance with regulations comparable to those in use over the past several years" (*id.* at 137, 141), but that an additional tier of funding should be provided for major metropolitan areas. The third, *Part 19: House Hearings* 857, was testimony, quoted in part in text at page 30, *supra*, that although the prior school attendance area eligibility

was simply fine-tuning the attendance area eligibility standards.

Any possible doubt regarding the legislative intent in this regard is laid to rest by the general statutory savings clause, 1 U.S.C. 109, which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall expressly so provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such * * * liability."

This statute embodies a congressional policy, binding on the courts, against retrospective application of statutory changes that would impair the government's ability to enforce liabilities—whether civil or criminal—for violations of prior law. It applies to amendments as well as to outright repeals. *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974); *United States* v. *Mechem*, 509 F.2d 1193, 1194 n.3 (10th Cir. 1975); *Moorehead* v. *Hunter*, 198 F.2d 52, 53 (10th Cir. 1952). Moreover, "the term 'liability' as used in the general savings statute has been broadly construed by the courts to comprehend all obligations arising out of any breach of a statutory duty." *NLRB* v. *National Garment Co.*, 166 F.2d 233, 237 & n.4 (8th Cir. 1948) (citing cases). Accord, *Hertz* v. *Woodman*, 218 U.S. 205, 217-218 (1910); see also *United States* v. *Carter*, 171 F.2d 530 (5th Cir. 1948) (ap-

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standards "made sense in the early years of the title I program," they now "impede the program's effectiveness." *Part 19: House Hearings* 859. By no stretch of the imagination could these three brief passages in the hearings be considered evidence that Congress thought the prior standards were an "injustice" that should be changed retroactively.

plying statute to require restitution of overcharges to purchasers of housing under expired statute).[21]

The court of appeals' retroactive application of the 1978 reauthorization of Title I plainly contravenes that congressional policy. Nothing in the 1978 legislation expressly prohibited the continuing applicability of the substantive standards under which the 1970-72 grants were made; the general savings statute thus requires that liabilities incurred under those standards remain enforceable.

C. The Court Of Appeals Erroneously Applied A Presumption In Favor Of Retroactive Application Of The 1978 Standards

The 1978 amendments—both their language and their legislative history—evince a clear intention to apply prospectively, and the general savings clause, 1 U.S.C. 109, further reinforces the congressional judgment to preserve liabilities incurred under prior law. But even if the direct evidence of congressional intent were less clear, the court of appeals still would have erred in indulging a presumption in favor of retroactivity of the type of substantive legislative change at issue here.[22]

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[21] That respondent's liability here arose from its violation of a regulation rather than the Title I statute itself does not affect the applicability of the savings clause. A liability incurred under a valid regulation is, for all legal purposes, "incurred under" (1 U.S.C. 109) the statute; the regulation, no less than the statute, has "legislative effect." See *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977).

[22] The terminology used in this area—"retroactive" (or its synonym, "retrospective") versus "prospective" application of law—is not always used consistently. The classic definition (and that adopted for purposes of this brief) was stated by

In *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), this Court reviewed the precedents concerning application of a change in law to cases pending on appeal. Under the circumstances of that case, the Court applied the general principle (*id.* at 711) that:

Justice Story in *Society for the Propagation of the Gospel in Foreign Parts* v. *Wheeler*, 2 Gall. 105, 139 (C.C.D.N.H. 1814):

> [E]very statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.

Accord, 2 C. Sands, *Sutherland's Statutory Construction*, § 41.01, at 245-246 (4th ed. 1973). This understanding holds whether the change in law occurs during the pendency of litigation on the issue (*e.g.*, *Greene* v. *United States*, 376 U.S. 149 (1964); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)), or whether the change in law precedes any litigation in the matter (*e.g.*, *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Union Pac. R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913)). The question is simply whether a new statute is intended to affect the treatment of conduct or transactions completed under prior law.

This question should be differentiated from the related question (frequently faced by this Court) whether a judicial decision that "changes" the law (by reinterpreting it or holding a statute unconstitutional) should be applied "retroactively." See, *e.g.*, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940). Traditionally, changes in statutory law were viewed as prospective, and changes in decisional law as retrospective. *United States* v. *Security Industrial Bank*, 459 U.S. at 79. Even now, when significant exceptions have been recognized to both general principles, the relevant considerations in the two classes of cases remain distinct.

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

The Court also stated, however, that its decision did not "hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary" (*id.* at 715), and it expressly reaffirmed precedents such as *Greene* v. *United States*, 376 U.S. 149 (1964), and *Union Pac. R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913), which establish the limits to the general principle. See 416 U.S. at 716-717 & n.24, 720.

Those decisions, at first blush, appear at tension with the general principle enunciated in *Bradley*. In *Greene* and *Laramie Stock Yards*, this Court stated:

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Greene, 376 U.S. at 160 (citations omitted; ellipses and brackets in original); *Laramie Stock Yards*, 231 U.S. at 199.[23]

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[23] Many other decisions of this Court, both before and after *Bradley*, state the principle similarly. See, *e.g.*, *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982) ("[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928) ("[s]tatutes are not to be given retroactive effect or construed to change the status of claims

The tension, we submit, is more apparent than real. In *Bradley*, the Court stated two broad limiting principles, the combined effect of which is to enshrine as exceptions to the general rule essentially the same category of statutory changes that were treated as presumptively prospective in *Greene* and like cases. In other words, the canon of construction favoring purely prospective application of new laws was "dropped from the formulation of a general 'rule' concerning retroactivity of intervening statutes, only to reemerge as an important basis for determining when an exception to the general rule should be made." *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, No. 83-7744 (2d Cir. Oct. 16, 1984), slip op. 6688.

The first such limiting principle stated in *Bradley* is that any presumption of retroactivity must yield to "statutory direction or legislative history to the

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fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears" (citing cases)); *United States* v. *St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926) ("[t]hat a statute shall not be given retroactive effect unless such construction is required by explicit langauge or by necessary implication is a rule of general application"); *Cameron* v. *United States*, 231 U.S. 710, 720 (1914) ("[i]n the absence of a clearly expressed legislative intent to the contrary the court will presume that the law-making power is acting for the future and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force"); *United States Fidelity & Guaranty Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) ("[t]he presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other"); see Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936).

contrary" (416 U.S. at 711; see *id.* at 715-716 n.21). The Court expressly rejected two extremes—(1) that a statute may be applied retrospectively only where congressional intention to do so is "clear and stated," and (2) that a statute must "always" be applied retrospectively "in the absence of clear legislative direction to the contrary" (416 U.S. at 715). *Bradley* thus stands for the proposition that the retroactivity or prospectivity of a statute should be judged in accordance with the fair import of its language and legislative history, without excessive reliance on presumptions, whether for or against retroactivity.[24] As discussed in the previous section of this brief, the fair import of the language and legislative history of 20 U.S.C. 2732(a)(1) points toward a prospective application of the 1978 changes in school attendance area standards under Title I. Moreover, Congress has expressly directed that repeals and amendments of statutory law are not to be interpreted as releasing or extinguishing liability incurred under prior law, in the absence of explicit provision in the repealing or amending act. 1 U.S.C. 109. See pages 32-33, *supra*.

Bradley's second limiting principle is that the presumption of retroactivity should not be applied where it would result in "manifest injustice." 416 U.S. at 711. The Court interpreted the concept of "manifest injustice" broadly, recognizing the force of the argument against retrospective application in a wide variety of circumstances. For our purposes here, the most significant aspect of the "manifest injustice" inquiry specifically discussed in *Bradley* is that an

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[24] In *Bradley* itself, the Court concluded that, while the legislative history was to some extent "supportive of either position," it provided "at least implicit support for the application of the statute to pending cases." 416 U.S. at 716.

intervening change in law should not be presumed to apply to a pending case if "to do so would infringe upon or deprive a person of a right that had matured or become unconditional" (*id.* at 720).[25] This would seem virtually identical to the Court's formulation in *Greene* and *Laramie Stock Yards*, *i.e.*, that "a retrospective operation will not be given to a statute which interferes with antecedent rights * * *." See also *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982) (quoting same).[26]

The 1978 revision of Title I attendance area eligibility standards is a classic instance of a change in law that, if applied retroactively, would interfere with antecedent rights and obligations. Respondent's administration of the 1970-72 Title I program ended in 1972; its rights and obligations "had matured or become unconditional" as of that time. The auditors, whose task was to determine whether the federal funds were properly spent, concluded that some $1.1 million was spent in violation of the grant agreement. As this Court held in *Bell* v. *New Jersey*, slip op. 17, the federal government has a substantive

[25] There is no doubt that the rule of construction against retroactivity in these circumstances protects the United States, no less than any other litigant. See *United States* v. *Magnolia Petroleum Co.*, *supra*. Indeed, the general savings statute, 1 U.S.C. 109, expressly preserves liabilities incurred under former statutes. See pages 32-33, *supra*.

[26] The Comptroller General's position that authorization and appropriations legislation must ordinarily be applied prospectively (see page 26 & note 16, *supra*), is a valid generic application of this principle. On grounds both of congressional intent and of principles of federal grant law (see pages 25-26, *supra*), the rights and obligations of the federal government and its grantees mature and become fixed (absent explicit congressional action) at the time of the grants.

"right * * * to recover funds misused by the States." That right matured when the funds were misspent, and should not be defeased because of the fortuity that Congress changed the substantive standards for future grants some six years later, while administrative review processes were still dragging on.[27]

In general outline, then, *Bradley* and *Greene* exemplify not different principles, but application of a comprehensive general principle to different categories of change in statutory law. Whether the issue is viewed under the "manifest injustice" exception of *Bradley* or under *Greene*'s general rule against retroactivity is immaterial. Absent contrary indications of congressional intent, statutory changes in procedures or remedies, and those affecting future rights and obligations, are deemed retroactive in the sense that they apply to pending litigation even when it involves conduct or transactions that took place before the statutory change was enacted. Thus, an attorney's fee statute,[28] revised procedures to be followed before evicting a public housing tenant,[29] and a new process for a citizen to obtain injunctive relief against

[27] The contrast to *Bradley* is striking. The change of law at issue in *Bradley* (passage of an attorneys fees statute) affected "no change in the substantive obligation of the parties" (416 U.S. at 721); it merely redistributed part of the cost of obtaining a remedy. Even as to that, the statute served "merely * * * to create an additional basis or source for the [defendant's] potential obligation to pay attorneys' fees. It [did] not impose an additional or unforeseeable obligation upon the defendant" (*ibid.*).

[28] *Hutto* v. *Finney*, 437 U.S. 678, 694-695 (1978); *Bradley* v. *Richmond School Board*, *supra*.

[29] *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-283 (1969); cf. *Ziffrin, Inc.* v. *United States*, 318 U.S. 73 (1943) (ICC permit application requirements).

election law violations,[30] to name three recent examples, have all been applied to cases that had their genesis before the governing law was changed. However, statutes are presumed not to alter substantive rights or obligations arising from past conduct or transactions. Thus, bankruptcy laws have been construed not to eliminate property rights, such as liens, that were obtained under prior law,[31] and regulations adding new substantive prerequisites have been construed not to defeat rights to compensation for wrongful discharge under prior law.[32] Presumably this is because of the deeply rooted principle in Anglo-American jurisprudence that it is unjust to apply new substantive legal standards to conduct or transactions that occurred in the past. See Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936).[33]

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[30] *Cort* v. *Ash*, 422 U.S. 66, 74-77 (1975); cf. *United States* v. *Alabama*, 362 U.S. 602 (1960) (statute authorizing action against a state).

[31] *United States* v. *Security Industrial Bank*, 459 U.S. at 79-81.

[32] *Greene* v. *United States*, *supra*.

[33] The celebrated case of *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), falls into this latter category of cases in which substantive rights under prior law would be impaired by retroactive application of a change in law (there, a treaty with France). Thus, Chief Justice Marshall stated that a court "will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." *Id.* at 110. There, however, the intervening change in law applied unmistakably to pending cases; especially in light of the great national concerns implicated by the treaty, the Court felt constrained to interpret the treaty not in accordance with the usual presumption against retroactivity, but according to "its manifest import." *Ibid.*

This Court's opinion in *Bell* v. *New Jersey* exemplifies these constraints. The Court held that the forum for administrative review of the audit determinations in this case was altered by the 1978 reauthorization legislation, but only "[t]o the extent that [the 1978 Act] merely changed the forum for assertion of a pre-existing right." Slip op. 8 n.7; see also *id.* at 3-4 n.3, 7 n.6, 18. The Court quoted Justice Holmes' opinion in *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916), to the effect that "a change of forum 'takes away no substantive right' and *thus* can apply retroactively" (*Bell* v. *New Jersey*, slip op. 3-4 n.3 (emphasis added)). Here, as the remand from this Court to the court of appeals makes clear (*id.* at 7 n.6), the question is what "substantive standards" apply to the 1970-72 expenditures; the court of appeals' retroactive application of "substantive standards" to conduct that occurred years before is thus contrary to the consistent practice of this Court.

The court of appeals nonetheless concluded that the 1978 change in the attendance area eligibility requirements must be presumed to apply retroactively.[34] It found the "presumption of retroactivity [to be] particularly strong" because the 1978 legislation was "remedial" (Pet. App. 4a).

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[34] It is something of a mystery why the court of appeals chose to apply the 1978 standards. By the time this case was briefed before the court of appeals on remand from this Court, the 1978 Act had been superseded by the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, which, as discussed at pages 7-8, *supra*, again altered the standards. And by the time the case was decided by the court of appeals, the standard had again been amended. Pub. L. No. 98-211, § 2(b), 97 Stat. 1412-1413. See page 8, *supra*. One of the vices of the court of appeals' holding is that the substantive standards to be applied to a supposedly retrospective audit come to depend on mere fortuity.

It is, indeed, frequently stated that "remedial" statutes are to be applied to cases pending at the time of enactment. See, *e.g.*, *Koger* v. *Ball*, 497 F.2d 702, 705-706 (4th Cir. 1974); *Silverlight* v. *Huggins*, 488 F.2d 107, 109 (3d Cir. 1973); *Connett* v. *City of Jerseyville*, 96 F.2d 392, 400 (7th Cir. 1938); cf. *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163, 167-168 (1933). But the court of appeals misunderstood this principle. For purposes of retroactivity analysis, a "remedial" statute is one that relates to *remedies* —one that neither enlarges nor impairs substantive rights, but relates to the means and procedures for enforcing those rights. *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 224 (1957); *Winfree* v. *N. Pac. Ry.*, 227 U.S. 296, 301-302 (1913); 2 C. Sands, *Sutherland's Statutory Construction*, § 41.09, at 280-286 (4th ed. 1973); see also *Bell* v. *New Jersey*, slip op. 3-4 n.3, 7 n.6, 8 n.7.[35] As noted above, this Court has already determined that the issue here involves "the substantive standards" applicable to pre-1978 Title I grants (*id.* at 7 n.6); it has nothing to do with remedies.

The court of appeals also considered it significant that "the case • • • involves a public matter of great national concern and is argued on direct appeal by two public agencies," as opposed to being "the routine private lawsuit in which a retrospective application of a law would disadvantage a private party" (Pet.

[35] *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967), upon which the court of appeals relied (Pet. App. 4a-5a), did not relate to the question of retroactivity. The Securities Exchange Act, at issue there, was "remedial" in the sense that it provided a new substantive remedy for previously inadequately protected interests; the Court simply noted that it should be interpreted to effectuate that remedial purpose. The Court certainly did not suggest that, because the Act was remedial in that sense, it should apply to conduct occurring before it was passed.

App. 5a, citing *Bradley*, 416 U.S. at 716-721). In this regard as well, the court below misinterpreted *Bradley*. The opinion in *Bradley* does not remotely suggest that retroactivity analysis must overlook unfairness to governmental entities or the public. Indeed, the Court expressly noted (*id.* at 720) that an award of attorney's fees would not be unfair to the School Board, which from the outset of the litigation had had a constitutional obligation to provide a nondiscriminatory education and also knew that it faced the possibility that it would be required to pay attorneys' fees (*id.* at 721).

Instead, the Court in *Bradley* was making an affirmative point: that attorney's fees in that context would further the "great national concern" of eradicating racial segregation (416 U.S. at 419), and that the public entity involved, no less than the public at large, stood to benefit from the vindication of constitutional rights (*id.* at 418).

Comparable concerns in the instant case point against retroactive application of the 1978 standards. The "great national concern" implicated in this case is the federal government's ability to ensure that grantees comply with the terms and conditions of their grants. The "two public agencies" involved in this case (Pet. App. 5a) both stand to gain, in the long run, from certainty and predictability in the substantive requirements of federal grants. The government's ability to enforce—and the grantees' incentive to comply with—Congress's decisions regarding the expenditure of Title I funds would be greatly impaired by a decision rendering the terms and conditions of Title I grants subject to subsequent shifts in congressional or administrative policy.

D. Repayment Of Misspent Funds By Respondent Is Necessary For Effective Enforcement Of The Terms And Conditions Of Title I, And Will Not Injure The Interests Of Title I Students In New Jersey

The requirements violated by respondent's program in Newark were designed to ensure that limited Title I funds would be spent only in the neediest areas within each school district. Although the wisdom of the policy reflected in the regulations violated by respondent is subject to honest debate—and indeed that policy was modified by regulation in 1976 and statute in 1978—there is no serious doubt that the regulations were a lawful exercise of the rulemaking authority specifically granted to the Commissioner. 20 U.S.C. (1976 ed.) 241e(a), 242(b). Certainly nothing in the decision below suggests otherwise. Nor is there any doubt that respondent materially violated those regulations. Respondent does not contend otherwise. Nor can there be any claim that selection of eligible attendance areas is a "technical" or insignificant matter that might easily be overlooked. See *Bell* v. *New Jersey*, slip op. 2 (White, J., concurring). The careful attention paid by Congress and the agency to this issue refutes any such suggestion. Designation of eligible areas plays a central role in fulfilling the basic purpose of Title I to concentrate limited resources in areas with high percentages of children from low-income families.[36]

[36] The Comptroller General has designated the grantee's "coverage of services" as one of the most important items for an auditor to examine with respect to conformity to legal and regulatory requirements, noting that "[i]f funds are used to provide services to ineligible recipients * * *, the total amount of the award may have to be returned to the grantor agency." Guidelines for Financial and Compliance Audits of Federally Assisted Programs, 45 Fed. Reg. 21837, 21844 (1980). The Comptroller General is entrusted by statute with the responsibility for establishing principles for federal audits. 31 U.S.C. 3511.

The sole issue here is whether a grant recipient can avoid liability for misspent funds, even though it has failed to fulfill an assurance made when the funds were received and expended, simply on the ground that *subsequent* grants did not require the giving of that assurance. Such a principle would be devastating to the federal government's ability to enforce the terms and conditions of federal grants.

Even where the terms and conditions of grants remain fixed, the auditor's task of determining compliance with all program requirements is massive. The sheer number of programs to be audited, coupled with the profusion of legal rules, both categorical and cross-cutting, makes the auditing process an extremely difficult enterprise. One commentator has noted that "determining whether a grant project has been conducted 'properly' is a very complex undertaking. * * * Not only must the audit team master the intricacies of the [general rules applicable to grants], but it must also master the individual trappings—often unbelievably complicated—of law, regulation, manual, forms, instructions, and practices of each of the hundreds of separate grant programs." R. Cappalli, *Federal Grants and Cooperative Agreements* § 6:01, at 6-3 (1982). This is aggravated by the fact that most auditors are not lawyers.

If, in addition to the other difficulties, the substantive standards applicable to grants are deemed to fluctuate over time, as Congress or the agency adopts a new policy, the audit problems will be magnified many times over. The difficulty is especially acute with regard to a program like Title I, where close congressional and administrative oversight results in

frequent statutory and regulatory changes in the conditions under which grants are made. An audit necessarily assumes that the standards to be applied are fixed—otherwise, there is no way to determine whether the expenditures were proper. As the Education Appeal Board, a body with extensive experience in this area, observed (Pet. App. 48a): "auditors could not conduct an effective audit if the grantees were permitted, years after the funds had been spent, to use new methods for computing attendance area eligibility."

Retroactive changes in program standards would sow other seeds of confusion as well. The records and data needed to evaluate compliance under a different standard than that prescribed at the time might not be available.[37] The uncertainty caused by the court of appeals' rule may thus have a tendency to stimulate unnecessary record creation and retention. Under the court of appeals' approach, parties might gain an interest in delaying audit review proceedings, in the hope that a more favorable standard might be adopted. Different standards would apply to different grantees, depending on when their appeal was ultimately settled—with all the attendant injustice

[37] This case is a prime example. The court of appeals directed the Secretary to determine whether respondent satisfied the requirements of the 1978 Act for each disputed attendance area, but there is no assurance that the records necessary to make that determination for 1970-72 are still available, or indeed were ever collected. Under regulations in effect at the time, Title I expenditure records were not required to be maintained beyond five years unless they were involved in an audit; there was no requirement that a state even compile expenditure records of the kind necessary for a determination of compliance with the new standard (20 U.S.C. 2732(a)(1)). 45 C.F.R. 116.54 (1972). Accord, 34 C.F.R. 200.56 (Chapter 1 recordkeeping requirement).

and claims for relief that such disparate treatment would generate. The simple need for fairness and finality thus argues strongly against the result below.

The House of Representatives has recently considered, and rejected, a provision in a committee bill that would have required application of "current law" in all Title I audit cases. Representative Ford explained the case against the proposal. His reasoning applies equally to the decision below. 130 Cong. Rec. H7814 (daily ed. July 25, 1984):

> Such a standard would violate the basic principle that grantees should be held accountable for the expenditures of funds under the law as it was when they received the funds. A current law standard would treat differently grantees who received funds at the same time. Depending on when they were audited, grantees would be held to different program requirements based upon the state of the law when they were audited. A grant might be made on the basis of one set of standards, an audit conducted on a second, an administrative appeal heard on a third, and judicial review sought on a fourth.

If changes in statutory or regulatory standards were to impose more stringent—or simply different—conditions on the grant recipients than those to which they agreed to conform when they received and expended the funds, it is clear that the failure to comply with the subsequent conditions, no matter how desirable they might be as a matter of policy, would be no ground for demanding the recoupment of funds that were properly expended under the conditions applicable at the time the expenditures were made. See *Pennhurst*, 451 U.S. at 24. The result should be

no different when the subsequent conditions are less, rather than more, stringent. The propriety of the expenditures depends on the standards in effect when they were made, not on those subsequently enacted for later grants.

The court of appeals' apparent reluctance to permit the Secretary to invoke the recoupment remedy in these circumstances flies in the face of the clear congressional intention, reviewed by this Court in *Bell* v. *New Jersey*, slip op. 8-16, that the Department recapture misspent funds. Indeed, Congress made the agency's agreement to undertake actions to recapture misspent funds "an essential condition for enacting the proposed legislation." 111 Cong. Rec. 7690 (1965), quoted at *Bell*, slip op. 9. There is no need to reiterate that history here. It suffices to say that the court of appeals apparently substituted its own view of salutary public policy for that of Congress.

It should be noted that the cost of a repayment order does not fall on the schoolchildren served by Title I. Rather, the liability runs against the grantee, which has the obligation to repay the misspent funds *and* to maintain the full level of Title I programs. *Bell*, slip op. 9 n.8. Moreover, even with respect to the state grantees, Congress has mitigated the harshness of the remedy. It has authorized the Secretary to return to the states up to 75% of repaid funds where the practices that led to the misuse have been corrected (as here), and where the returned funds will, to the extent possible, be used to benefit the population affected by the misuse and will serve to achieve the purposes of the state Title I program. 20 U.S.C. 1234e(a).[38] This approach, established by

[38] This grantback authority has been exercised by the Secretary on numerous occasions. See, *e.g.*, 49 Fed. Reg. 34886-34887 (1984) (Rhode Island); 49 Fed. Reg. 13899-13900 (1984) (West Virginia); 49 Fed. Reg. 8474-8476 (1984) (South Carolina); 47 Fed. Reg. 20343-20345 (1982) (Wisconsin); 47 Fed. Reg. 23002-23003 (1982) (District of Columbia).

law, is the appropriate means for addressing any perceived harshness in the treatment of respondent here. The court of appeals seriously erred in attempting to achieve the same objective by making a disruptive and unwarranted change in the law applicable to federal grants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 83-2064

In the Supreme Court of the United States

OCTOBER TERM, 1984

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JUNE 15, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

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*The opinions of the district court and the court of appeals are printed in the appendix to the petition for writ of certiorari and have not been reproduced.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Case No. 80-1991

Date	FILINGS—PROCEEDINGS

1980

July 7 Petition for review of a decision of the Secretary of Education, received July 7, 1980, filed. (6cc) Service attached.

Copy of above petition served by mail on Secretary of Education.

July 15 Appearance of John J. Degnan and M. Kathleen Duncan, Esqs., for petitioner, filed.

July 21 Appearance of Philip H. Rosenfelt and Robert J. Arnot, Esqs., for respondent, filed.

Aug. 18 Certified list of the record on review, filed. (1cc—3 add'l cc rec'd 8/29/80)

Sept. 26 Consent motion by petitioner for leave to extend time to file brief and appendix to October 29, 1980, *with* Affidavit of M. Kathleen Duncan, Esq., in support of motion, filed. (4cc) Service attached.

Oct. 1 Submitted on above consent motion. Clerk

Oct. 3 Order (Clerk) granting the above consent motion and stating that no further extensions will be permitted for any reason, filed.

Nov. 3 Consent motion by petitioner for leave to file brief and appendix out of time by November 3, 1980, *with* Affidavit of M. Kathleen Duncan, Esq., in support of motion, filed, (4cc) Service attached.

Nov. 5 Submitted on above consent motion. Clerk.

Nov. 6 Order (Clerk) granting the above consent motion under the circumstances and directing that petitioner's brief and appendix are filed as of the date of this order, filed.

Nov. 6 Brief for petitioner, rec'd November 3, 1980, filed. (25cc) Certification of bar membership attached.

Date	FILINGS—PROCEEDINGS

Nov. 6 Appendix, Vols. I, II, III & IV, rec'd November 3, 1980, filed. (4cc)

Nov. 6 Affidavit of service of petitioner's brief and appendix by mail on 11/3/80, rec'd 11/3/80, filed.

Nov. 21 Consent motion by respondent for leave to extend time to file brief to January 8, 1981, filed. (4 cc) Affidavit of service attached.

Nov. 26 Submitted on above consent motion. Clerk

Dec. 2 Order *(Clerk)* granting the above consent motion and no further extensions will be permitted, filed.

1981

Jan. 7 Brief for respondent, w/service by mail on 1/7/81, filed. (25 cc)

Jan. 29 Consent Motion—O/T pet's R.B. by 2/2/81, w/service, filed.

Feb. 2 Submitted. Clerk.

Feb. 4 Order *(Clerk)* Granting pet's mot. to file R.B. o/t by 2/2/81 and no further XT will be permitted, filed.

Feb. 2 R. brief for petitioner, w/service by mail on 2/2/81, filed. (25 ccs) Cert. of bar membership attached.

May 7 Order (*Adams*, C.J.) directing 15 mins. oral argument time for each side, filed.

May 18 Argued. Coram: Adams, Rosenn & Higginbotham, C.J. (Court directed counsel to have trans. of oral argmt. prepared).

June 18 Transcript of tape of oral argument in this Ct. on 5/18/81, rec'd at direction of Court.

Oct. 13 Order (Adams, Rosenn & Higginbotham, C.J.) consolidating the petitions for review at Nos. 80-1991 & 80-2302 for disp. by the Ct., filed. (Cov. 80-1991 & 2302)

Date	FILINGS—PROCEEDINGS

Oct. 13 Opinion of the Court (Adams, *Rosenn* & Higginbotham, C.J.), w/concur by J. Higginbotham, filed. (Cov. 80-1991 & 2302)

Oct. 13 Judgment granting the petition for review; reversing the order of the U.S. Dept. of Education dated 5/7/80, appealed at No. 80-1991, & 7/16/80, appealed at No. 80-2302 and remanding the causes for vacation of the orders requiring repayment by petrs. of previously rec'd Title I funds, w/costs against resp., filed. (Cov. 80-1991 & 80-2302)

Oct. 26 Motion—XT resp's pet. for rehg for 30 days to 11/26/81, w/serv., filed. (Cov. 80-1991 & 2302)

Oct. 27 Bill of costs for petitioner, w/serv., filed.

Oct. 30 Order (Rosenn., C.J.) granting above XT mot. to file pet. for rehg. by 11/26/81, filed. (Cov. 80-1991 & 2302)

Nov. 30 Motion by respondent to file pet. for rehg. which includes a 7 pg. addendum in addition to the 15 pgs. of text, or in the alt., to strike the 7 page addendum from such pet. as filed by resp., w/serv., filed. (Cov. 80-1991 & 2302)

Dec. 7 Order (Rosenn, C.J.) granting resp's mot. for leave to file pet. for rehg. with addendum attached, filed. (Cov. 80-1991 & 2302)

Dec. 7 Petition by respondent for rehg. & suggestion for rehg. en banc, w/addendum, w/serv., filed. (25 cc) (Cov. 80-1991 & 2302)

Dec. 17 Order denying petition for rehg. for the Court en banc, filed. (cov. Nos. 80-1991 & 80-2302)

Dec. 28 Cert. judgm. issued in lieu of formal mandate. (cov. Nos. 80-1991 & 80-2302)

Date	FILINGS—PROCEEDINGS

1982

Jan. 20 Costs taxed in the amount of $359.29 in favor of petr. Commonwealth of PA added to Cert. judgm. pursuant to Rule 39(d), F.R.A.P.

Dec. 28 Certified list returned to the Secretary.

Mar. 10 Copy of letter dated 3/8/82, to Sol. General of the U.S., adv. the S.C. XT for filing cert. to 4/16/82, rec'd from C of the S.C. (Cov. 80-1991 & 80-2302)

Apr. 8 Copy of letter dtd. 4/8/82, to Sol. General of the U.S., adv. the S.C. has XT for filing cert. to 5/16/82, rec'd from C of the S.C. (Cov. 80-1991 & 80-2302)

May 21 Notice—Cert. filed 5/17/82, filed. (S.C. No. 81-2125) (Cov. 80-2302)

Oct. 7 Order—Cert. granted 10/4/82, filed. (S.C. No. 81-2125) (Cov. 80-1991 & 80-2302)

1983

Jan. 12 Certified copy of Appendices and partial proceedings in this Court forwarded to the Clerk of the S.C. pursuant to his request. (Covers 80-1991 and 80-2302)

May 11 Certified copy of all briefs filed in this Court forwarded to Clerk of S.C. pursuant to his request. (Covers 80-1991 & 80-2302)

June 2 Copy of S.C. Opinion (S.C. No. 81-2125) rec'd from Clerk of the S.C. for the information of the Court. (Covs. 80-1991 & 80-2302)

July 5 Cert. copy of S.C. judgment dated May 31, 1983, reversing, with costs, the judgment of this Court and remanding to this Court for further proceedings in conformity with the opinion of the Supreme Court, etc., filed. (Cov. 80-1991 & 80-2302)

July 20 Order on Remand From the Supreme Court of the United States (Adams, Higginbotham and *Rosenn*, Circuit Judges) Vacating this Court's judgment filed October 13, 1981. It is further ordered that the Clerk of

Date	FILINGS—PROCEEDINGS

this court reschedule for further briefing and hearing at the earliest convenience of this court the respective petitions for review filed by the States of New Jersey and Penna. In the above cases, filed. (Cov. 80-1991 and 80-2302)

July 22 Order (Seitz, Chief Judge) designating Judge Rosenn to hold conferences with counsel for the respective parties for the purpose of determining whether this matter can be settled by the parties, filed. (Cov. 80-1991 & 80-2302)

July 27 Order (Rosenn, C.J.) directing settlement conference in the above-entitled matters will be held in the chambers of Judge Rosenn, Room 20614, U.S. Courthouse, Phila., PA, on Monday, August 8, 1983 at 11:00 a.m., filed. (Cov. 80-1991 and 80-2302).

Aug. 2 Certified list refiled.

Sept. 27 Order (Clerk) directing that petitioner and respondent shall hand-file and hand-serve supplemental briefs simultaneously in photostatic, legible form no later than October 12, 1983; and that the Clerk list the case for disposition on the merits at the earliest convenience of the Court, filed.

Oct. 12 Supplemental brief for petitioner. MS 10/12/83, 10cc

Oct. 11 Supplemental brief for respondent. MS 10/11/83, 25cc

Oct. 25 Responses of respdt. to questions, recd at the direction of the Court.

Oct. 26 Letter dated 10/25/83, from Mary Ann Burgess, Esq., counsel for pet., rec'd at the direction of the Court.

Date	FILINGS—PROCEEDINGS

Oct. 20 Clerk's letter to counsel, written at the dir. of the Court, requesting cnsl. to address the following question: (1) Does the legislative history of § 101(a) of the Education Amendments of 1978 Pub. L. No. 95-561, 82 Stat. 2161-62, U.S.C. § 2732(a)(1), contain any specific indications of Congress' intent as to retroactive application of this provision?; (2) Are any data, other than the calculations in the federal auditor's report, necessary to determine the effect of a retroactive application of 20 U.S.C. § 2732(a)(1)? Answers to these questions, if poss., in written form, orig. & 3 ccs., prior to oral argmts. Otherwise, cnsl. be prepared to specify answers at oral argmt.

Oct. 19 Order (Adams, C.J.) directing 15 mins. reargmt. time for each side, filed.

Oct. 26 Reheard on remand. Coram: Adams, Hunter & Higginbotham, C.J.

Nov. 4 Letter dated November 3, 1983, from Philip S. Rosenfelt, Esquire, counsel for respondent, received at the direction of the Court, filed.

Nov. 8 Clerk's letter to counsel for petitioner requesting that they file a letter memorandum to the Sec. of Education's letter of 11/3/83, with responses no later than 11/14.

Nov. 14 Copy of ltr dtd 11/10/83 recd from Mary Ann Burgess, counsel for Aplnt, recd at direction of Ct., filed.

Dec. 25 Letter dated Nov. 23, 1983 received from counsel for Respondent, rec'd for the information of the Court.

Dec. 27 Opinion of the Court on remand from the Supreme Ct (*Adams*, Hunter & Higginbotham, C.J.'s), filed.

Dec. 27 Judgment remanding the within cause to the Secty of Education for further proceedings consistent w/the opinion of this Court., filed.

Date	FILINGS—PROCEEDINGS

1984

Jan. 4 Motion by respondent for enlargement of time within which to file a pet for rehg to and incl 2/9/84, filed.

Jan. 5. Order (*Adams*, C.J.) Granting mot by resp for enlargement of time within which to file a pet for rehg to and inl 2/9/84, filed.

Feb. 9 Petition for Rehearing of Respondent before the Court in banc, filed.

Feb. 17 Order (Seitz, Ch J, Aldisert, *Adams*, Gibbons Hunter, Weis, Garth, Higginbotham, Sloviter & Becker, C.J.'s) Denying petition for rehearing, filed.

Feb. 27 Certified judgment in lieu of formal mandate issued.

Feb. 27 Record released to the Sec.

Jun. 25 Notice of Filing petition for writ of cert., filed on June 15, 1984, filed.

Oct. 3 Certified copy of S. C. Order dated Oct. 1, 1984 granting petition for writ of certiorari, filed.

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
REGION II

26 Federal Plaza
New York, New York 10007

Audit Agency

June 20, 1975

Audit Control No. 50006-02

Dr. Fred G. Burke
Commissioner
New Jersey State Education Department
225 West State Street
Trenton, New Jersey 08625

Dear Dr. Burke:

Enclosed for your information and use is a copy of an HEW Audit Agency report titled, "Audit of Title I of the Elementary and Secondary Education Act of 1965 Administered by the State of New Jersey, Relating to Selection of Target Areas in Newark, New Jersey, for the period September 1, 1970, to August 31, 1973." Your attention is invited to the audit findings and recommendations contained in the report.

In accordance with the principles of the Freedom of Information Act (Public Law 90-23), HEW Audit Agency reports issued to the Department's grantees and contractors are made available, if requested, to members of the press and general public.

To facilitate identification, please refer to the above audit control number in all correspondence relating to this report.

Sincerely yours,

/s/ Bernard Luger
Regional Audit Director
HEW Audit Agency

Enclosure

Direct Reply To:

Deputy Commissioner
Bureau of School Systems
Office of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Audit Control No. 50006-02

REPORT OF AUDIT
TITLE I OF THE
ELEMENTARY AND SECONDARY EDUCATION
ACT OF 1965
Administered by the
STATE OF NEW JERSEY

Relating to Selection of Target Areas
in Newark, New Jersey

For the Period
September 1, 1970, to August 31, 1973

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REPORT OF AUDIT
TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965
Administered by the STATE OF NEW JERSEY

Relating to Selection of Target Areas in Newark, New Jersey

For the Period September 1, 1970, to August 31, 1973

INTRODUCTION

Background

Title I of the Elementary and Secondary Education Act of 1965 (Public Law 89-10), as amended, authorizes Federal support to local educational agencies for special educational programs for educationally deprived children in attendance areas where low-income families are concentrated. Federal funds are allotted to State educational agencies who, in turn, sub-allot the funds to eligible local educational agencies.

To participate in the Title I program, school attendance areas must meet specific eligibility criteria which are stated in Title 45, Part 116, of the Code of Federal Regulations (CFR). These regulations which implement the Act stipulate that to be eligible an attendance area must have a high concentration of children from low-income families, expressed either in percentages or numbers, equal to or greater than the district average.

Our previous audit report on the State's administration of the Title I program, Audit Control Number 90067-02, issued March 31, 1969, covered the period September 28, 1965 to August 31, 1967. In recognition of the amendments to the Act, specifically Section 106, Statute of Limitations, in Public Law 93-380 (enacted August 21, 1974)

and our interest in administrative controls in recent years, we have confined our audit coverage in this report to the period September 1, 1970 to August 31, 1973.

During this period, ESEA Title I funds allotted to the New Jersey State Department of Education (SDE) aggregated $156,166,574. The funds sub-allotted to the Newark Board of Education during this period totalled $28,709,198, about 18.4 percent of the allotments to the State. For school year 1973-74, program funds amounting to $61.5 million were allotted to the State of which the Newark Board of Education received $11.2 million.

During the 1972-73 school year, Title I funds were used by the City to support reading, mathematics, and bilingual programs in which 25,996 children participated. The number of participants represented approximately 32 percent of the total pupil enrollment of about 80,000 children as of September 30, 1972 in levels ranging from kindergarten through grade 12.

Scope of Audit

Our audit was made in accordance with standards for governmental auditing. The principal objective was to determine the propriety and efficacy of the methods used by the Newark Board of Education, and approved by SDE, to select eligible school attendance areas. In this review, we examined project applications submitted for approval by Newark to SDE and any related documentary support for the school years 1970-71 through 1972-73.

HIGHLIGHTS OF AUDIT RESULTS

Our audit showed that the Newark Board of Education (BOE) used Title I funds totalling over $1.1 million in school years 1970-71 and 1971-72 in schools which did not meet the eligibility requirements of the Title I regulations. Essential source data in support of the 1970-71 eligibility determinations was not available. However, at least one school, based on the low-income percentages

shown on the application, was improperly classified as eligible to receive Title I funds. In 1971-72, by using incorrect ratios (resulting in part from incomplete low-income statistics) BOE misclassified 13 schools as eligible to receive Title I services.

More critical analysis by the State agency and BOE of the Title I applications for these years would have disclosed the need to validate the eligibility determinations and would have prevented the improper use of program funds. Although various conditions noted in these years did not recur and the City's eligibility determinations for school year 1972-73 were properly made, there was no documentary evidence from which we could determine whether these improvements stemmed directly from critical reviews by the State agency. (See Other Matters section of report, page [34.]

FINDINGS AND RECOMMENDATIONS

Selection of Target Areas

The Newark Board of Education (BOE) used Title I funds totalling over $1.1 million in school years 1970-71 and 1971-72 in schools which did not meet the eligibility requirements of the Title I regulations.[1] A critical review of the project applications for these years by BOE and State agency officials would have disclosed information gaps and a lack of detail on the methods used to determine eligibility of school attendance areas. Essential source data in support of the 1970-71 eligibility determinations was not available. However, at least one school, based on the low-income percentage shown in the application, was improperly classified as eligible for Title I support. In 1971-72, by using incorrect ratios (stemming in part from incomplete low-income statistics) BOE misclassified 13 schools as eligible to receive Title I serv-

[1] Title 45, Part 116, of the Code of Federal Regulations (CFR).

ices. In both years the ineligible schools were designated as project areas and used Title I funds. Eligibility determinations were properly made by BOE in school year 1972-73.

Provisions of Section 116.17, as amended November 28, 1968, set forth specific criteria as standards to determine the eligibility of school attendance areas to receive grant funds under the Title I program. Correct application of these criteria is the first step in the process to upgrade the education of educationally deprived children. The attendance areas which meet the eligibility requirements may or may not be included in Title I projects (and project areas) dependent on the number of educationally deprived children residing in these areas and their educational needs.

In citing the tenets to be observed in this process, the regulations mandated that Title I projects be established in attendance areas which have high concentrations of children from low-income families. Further elaborating on this basic requirement for attendance area eligibility, Section 116.17(d) stipulated that a school attendance area may be designated a project area ". . . if the estimated percentage of children from low-income families residing in that attendance area is as high as the percentage of such children residing in the whole of the school district. . . ." This section also cited an alternative but analogous provision under which the designation may be made ". . . if the estimated number of children from low-income families residing in that attendance area is as large as the average number of such children residing in the several school attendance areas in the school district." The regulations permitted an entire school district to be designated as a project area but only if there were slight differences in concentration of children from low-income families. Basically, these criteria have remained unchanged in successive revisions to the regulations.

In a separate directive (ESEA Title I Program Guide No. 44) to Chief State School Officers issued March 18, 1968, the Office of Education again placed special stress on the regulatory criteria for determining the eligibility of school attendance areas to participate in Title I projects. Section 1.1 of this directive defined an attendance area for the purposes of Title I as an area served by a public school and further stipulated: "For each such attendance area data must be secured on (a) the total number of children who according to their ages are eligible to attend the public school serving that area and (b) the number of such children who are from low-income families." Section 1.1 further defined the criterion for eligibility as follows: "In all cases the number of children considered eligible to attend a particular school consists of all children of the appropriate ages including children attending private schools and children who have dropped out of school."

The program guide suggested various income data sources as guidelines for arriving at attendance area eligibility determinations. It placed primary importance on two sources to ascertain the actual or estimated number of children from low-income families—the number of children in families receiving Aid to Families with Dependent Children or the children receiving free lunches. Housing, health, or employment statistics were also to be considered. The attendance areas were then to be ranked according to the percentage of children from low-income families or to the average number of such children unless there were no wide variations in the population sizes in the various attendance units. The directive also underscored a basic injunction: "Whatever data are used must be used uniformly throughout an applicant's district." In its Title I application for school year 1970-71, the City stated that it had considered eight sources of data, identified as criteria, in its determination of attendance area eligibility. Among these criteria, as enumerated in

paragraph 1.2 of Section II A of the application were the following:

"1.2.1 Statistics on Aid for Dependent Children supplied by the Essex County Welfare Board.

1.2.2 Free lunch and free breakfast programs

1.2.3 Model Cities statistics

1.2.4 Housing statistics"

However, the City did not retain this source data nor have available for our review an analysis of these statistics and information showing the weight given to each criterion in arriving at the determinations of attendance area eligibility. In the absence of this essential substantiation, we could not confirm the reliability of the district-wide percentage of low-income children, stated in the application as 25.5 percent, nor validate the low-income percentage computed for each attendance area. Therefore, we could not determine whether all 74 schools listed in the Title I application, involving 22,848 program participants, were actually eligible for Title I funds. But among the schools included in the application was one (Lafayette Street School) which showed a low-income percentage of 23.5, two full points below the district-wide average of 25.5. Since this school did not meet the prescribed low-income eligibility criteria, its eligibility designation was patently erroneous and its use of Title I funds was improper. For school year 1970-71 Title I funds used by this school totalled $91,266. Our further examination of Title I expenditures for school year 1970-71 showed that 10 additional schools, excluded from the application and therefore ineligible to receive Title I services, had used program funds Totalling $41,021.[1] This condition was not found in other years

[1] These schools included the following: West Kinney Street Junior High, Alexander Street, Ann Street, Chancellor Avenue, Cleveland, Garfield, Mount Vernon, Arts High School, Springfield Avenue, and Maple Avenue.

covered by our review. Responsible BOE officials agreed that these expenditures were improper but could not explain how they had avoided detection.

In determining the eligibility of attendance areas for school year 1971-72 BOE stated in the Title I application that it had considered eight sources of data (similar to those used in the prior year), but had settled on using one source, the statistics on Aid for Dependent Children (ADC) supplied by the Essex County Welfare Board. By using this source, BOE arrived at a district-wide low-income ratio of 33.9 percent. In comparison to the 74 selected attendance areas and 22,848 program participants in school year 1970-71, the application for 1971-72 indicated that the number of selected attendance areas and participating children had increased to 76 and 23,864, respectively.

We found that the method used by BOE to determine the eligibility of attendance areas for school year 1971-72 deviated from the specific instructions stated in Section 1.1 of Program Guide No. 44. As indicated earlier in this report, the determination of attendance area eligibility is dependent on the relationship between (a) the total number of children eligible to attend the public school serving the attendance area, including those attending private schools and those who had dropped out of school and (b) the number of such children from low-income families. This can be expressed in a ratio, as follows:

Ratio A

$$\frac{\text{Total Number of Children from Low-Income Families in School Attendance Area (Col. 3)}^{1}}{\text{Total Number of Children Considered Eligible to Attend a Particular School (Col. 2)}^{1}} = \text{Percentage of Children from Low-Income Families (Col. 4)}^{1}$$

[1] The columnar references correspond to the application format for school year 1971-72 established by the Office of Education.

BOE used this ratio to compute the district-wide low-income relationship of 33.9 percent (32,352 ADC children divided by the total school age children population of 95,780). However, in computing the individual attendance area low-income percentages BOE applied other ratios which did not show a direct correlation between the entire eligible school population in the school attendance area and that segment of the population representing children from low-income families. Contributing to this disparity was incomplete information in the ADC statistics on the number of low-income children in the individual school attendance areas.

The ADC statistics furnished by the Essex County Welfare Board listed the total number of children in the ADC category enrolled at each regular public elementary and secondary school. However, the statistics were incomplete since they excluded those children on ADC rolls attending private and special education schools [1] or who had dropped out of school. The limitations of the statistics therefore suggested to the IEA the use of an alternative ratio permitted in Program Guide No. 44 under certain conditions.

The program guide recognized that in some instances (as did not exist in Newark) schools may not have ". . . well-defined attendance area boundaries or receive numbers of children from outside the areas that have been designed for those schools. . . ." In these cases, it may be necessary to use a different ratio, to base the ranking of the attendance areas for such schools on the ". . . . percentage or number of children from low-income families actually enrolled in those schools. . . ." This ratio under these circumstances is stated as shown below:

[1] Established for children with special handicaps, e.g. emotionally disturbed, mentally retarded but educable, deaf, etc.

Ratio B

$$\frac{\text{Total Number of Children from Low-Income Families Enrolled in a Specified School}}{\text{Total Enrollment in Specific School}} = \text{Percentage of Children from Low-Income Families}$$

As previously indicated, Ratio B was not applicable to Newark since the City had well-defined attendance areas. BOE nevertheless attempted to use it because the incompleteness of the ADC statistics left no other reasonable approach. While the ratio was not permitted to be used by BOE under Program Guide No. 44 criteria, it was a reasonable alternative under the circumstances. However, in its attempt BOE devised hybrid ratios which deviated from the method specified in the program guide. The results were unacceptable since there was no direct relationships between the component elements.

For each public elementary school, BOE included in the numerator [1] the number of ADC children enrolled in that school as well as the total number of ADC children residing in the school attendance area who were enrolled in junior and senior high schools. However, BOE limited the data in the denominator [2] to the total enrollment of the elementary school. There was therefore no meaningful relationship between the data shown in the ratio, namely the total ADC statistics for the attendance area and the elementary school enrollment. Lacking this correlation, the ratio had basic mathematical flaws which tended to inflate the low-income percentage for individual elementary school areas and thus to increase improperly the number of eligible attendance areas. The distortion is illustrated in the calculation of the low-income percentage for Madison Street School:

[1] Column 3 in application format for school year 1971-72 captioned: All Schools in the District Ranked by Percentage of Children from Low-Income Families.

[2] Column 2 in application format described in note [1].

No. of ADC children enrolled in Madison Street School in statistics furnished by the Essex County Welfare Board	445 (A)
No. of ADC children residing in Madison Street School attendance area enrolled in junior and senior high schools	380 (B)
No. of ADC children residing in Madison Street School attendance area enrolled in other schools, e.g. schools for the handicapped	112 (C)
Total No. of low-income children shown in application	937 (D)
Total pupil enrollment in Madison Street School	1544 (E)

Calculation of low-income percentage:

$$\frac{\text{No. of low-income children shown in application (937)}}{\text{Total pupil enrollment in Madison Street School (1544)}} = 60.6\%$$

The limitations of the available data prevented us from recalculating the low-income percentages for individual elementary school areas in accordance with the criteria mandated by OE. Therefore, in our recalculations we followed the reasonable alternative offered in Ratio B. As shown below, we considered only related data, as stated in Ratio B, namely the number of ADC children enrolled in Madison Street School (Item A) and the total pupil enrollment at the school (Item E). This recalculation (445÷1544) showed that the actual low-income ratio for Madison Street School was 28.8 percent, substantially below the district-wide average of 33.9 In recalculating the ratios of the 41 elementary schools presented as eligible in the Title I application we found that 10 schools had low-income ratios lower than the district-wide average and were thus ineligible for Title I funding. Data pertaining to these 10 schools is shown in the following tabulation.

Computation of Low-income Percentages for 10 Elementary Schools (Chart A)

School	Total Number of Low-income Children: Shown in Application	Total Number of Low-income Children: Enrolled at School	Total Number of Children Enrolled at School	Low-income Percentages: Shown in Application Col B ÷ Col D	Low-income Percentages: Computed Auditor Col C ÷ Col E
(Col A)	(Col B)	(Col C)	(Col D)	(Col E)	(Col F)
Madison	937	445	1544	60.6	28.8
Newton St.	446	256	812	54.9	31.5
So. 17th St.	823	519	1549	53.1	33.5
Central Ave.	314	174	592	53.0	29.4
Burnet St.	388	231	766	50.6	30.2
Waverly Ave.	299	191	599	49.9	31.9
Franklin	519	361	1115	46.5	32.4
M. Garvey	603	298	1304	46.2	22.9
Garfield	427	253	1229	34.7	20.6
Hawkins	414	361	1192	34.7	30.3

BOE used a different method to compute the low-income percentages for junior and senior high schools. In this second method to determine the eligibility of secondary schools, BOE added the low-income percentages of the pipeline or feeder elementary schools shown in the Title I application and arrived at an average, as illustrated below for Weequahic High School:

Feeder Elementary School	Low-income Percentage Shown in Application [1]
Bragaw Avenue School	48.4%
Chancellor Avenue School	20.5 [2]
Hawthorne Avenue School	44.0
Maple Avenue School	25.7 [2]
Peshine Avenue School	49.1
Total of low-income percentages	187.7%
Average low-income percentage 187.7% ÷ 5 =	37.5%

[1] Based on our use of Ratio B, the individual feeder elementary school percentages were recomputed respectively as 39.8%, 11.9%, 17.2%, and 40.5%.

[2] These schools had low-income percentages below the district-wide average of 33.9% and were therefore ineligible for I funding

Since the low-income percentages for these individual elementary schools were inflated as described earlier in this report, the resultant averages based on these percentages were similarly inflated.

The method was improper not only because it produced low-income percentage distortions but also because it was not authorized by the attendance area eligibility criteria discussed earlier in this report. Further, it was inconsistent with the method used to determine the eligibility of elementary schools. The use of dual approaches (population totals for elementary schools and averaged percentages for secondary schools) is specifically prohibited by the injunction in Program Guide No. 44 that data in attendance area eligibility determinations ". . . be used uniformly throughout an applicant's district."

In our recomputations of the low-income percentage for the 10 junior and senior high schools shown as eligible in the Title I application we used the same related information (Ratio B) that we had employed in our elementary school calculations i.e., the number of ADC children at each school and the total school enrollment. We found, as shown in the following tabulation, that three of these schools had low-income percentages below the district-wide average of 33.9 percent and therefore were not eligible to use Title I funds.

Computation of low-income Percentages for 3 Secondary Schools (Chart B)

School	Total Number of low-income Children Enrolled at School	Total Number of Children Enrolled at School	Low-income Percentage	
			Shown in Application	Computed by Auditor Col B ÷ Col C
(Col A)	(Col B)	(Col C)	(Col D)	Col E)
Clinton Pl. Jr. H.S.	491	1529	69.5	32.1
Weequahic H.S.	690	2470	37.5	27.9
East Side H.S.	264	2023	35.0	13.0

Since the schools listed in charts A and B did not meet the eligibility requirements of the Title I criteria, they were not authorized to receive grant funds under the Title I program. Title I expenditures made by these schools for school year 1971-72, totalling $1,029,630, were unallowable. The expenditures applicable to each school, rounded off to the nearest dollar, are summarized in the following chart.

Expenditures by Ineligible Schools for School Year 1971-72 (Chart C)

School	Expenditures		
	Salaries	Other Expenses	Total
Madison	$ 92,225	$ 11,525	$ 103,750
Newton Street	63,419	6,044	69,463
So. 17th Street	91,154	13,688	104,842
Central Avenue	56,225	5,307	61,532
Burnet Street	50,128	5,879	56,007
Waverly Avenue	51,651	5,014	56,665
Franklin	107,522	7,705	115,227
Marcus Garvey	102,438	17,049	119,487
Garfield	70,104	11,872	81,976
Hawkins	89,057	13,746	102,803
Clinton Pl. Jr. High	45,407	12,807	58,214
Weequahic High	40,402	12,882	53,284
East Side High	33,498	12,882	46,380
Total Unallowable Expenditures	$893,230	$136,400	$1,029,630

To recapitulate, the city's claims for school years 1970-71 and 1971-72 included unallowable expenditures of at least $1,161,917, as summarized below:

School Year 1970-71		
Expenditures by ineligible school (Lafayette) shown as eligible in application	$91,266	
Expenditures by 10 ineligible schools excluded from application	41,021	
Total unallowable expenditures		$ 132,287
School Year 1971-72		
Total unallowable expenditures-Chart C		1,029,630
Total unallowable expenditures 1970-71 and 1971-72		$1,161,917

During the audit we alerted the City to the impropriety of the ratios used to determine attendance area eligibility and sought an explanation for their usage. BOE's Central Office Coordinator for the Title I program agreed that the ratios used were incorrect and tended to inflate the low-income percentages. He ascribed the incorrect method to the lack of mathematical expertise of the individual responsible for preparing that part of the application. Further, he believed that this employee misconceived the criteria stated in Program Guide No. 44.

We found that the low-income percentages computed for school year 1972-73 were proper and were based on more precise information. The Essex County Welfare Board had furnished BOE with a list showing the name and address of each child, age 5-17, in the ADC category. BOE converted this data into attendance area statistics. Thus, BOE had available for the first time statistics indicating the total number of children from low-income families residing in the school attendance area, inclusive of drop-outs and attendees at public, non-public and special education schools.

There was no documentary evidence from which we could determine whether this improvement in the quality of the City's low-income information and the non-recurrence in succeeding years of various conditions in 1970-71 and 1971-72, discussed earlier in this report, resulted from critical reviews by the State educational agency (New Jersey State Department of Education—SDE). A thorough review of the 1970-71 application by SDE would have disclosed the ineligibility of Lafayette Street School to receive Title I program funds. Further, the City's use of eight sources of information in 1970-71 to determine the number of children from low-income families should have prompted SDE to request a written analysis showing how these various data sources had been used in arriving at the district-wide and individual attendance area low-income percentages.

Similarly, close review of the following year's application (1971-72) by SDE would have detected major gaps in the information relating to the selection of project area schools and triggered a request to the City to resolve the questions raised by SDE prior to application approval. For example, the application includes a brief description of the method used to determine the eligibility of secondary schools but offers no similar commentary on elementary schools. The omission is significant since the calculation for secondary schools involved averaging the low-income percentages of feeder elementary schools, as previously discussed in this report. If SDE had requested a description and an illustration of the method used in arriving at the elementary school percentages, SDE would have detected the basic flaws in the method and would have averted the improper use of over $1 million of Title I funds for the 13 elementary and secondary schools, as shown in Charts A, B and C. Further, if the methodology supporting the secondary school computations had been requested by SDE, the State would have learned, as previously illustrated by us, that the computations included ineligible as well as eligible elementary schools.

Another significant information gap pertained to the rationale for selection of the low-income information source used by BOE in arriving at its eligibility determinations. BOE stated in the application that it had considered eight sources of information before selecting the ADC statistics supplied by the Essex County Welfare Board. Among these low-income data sources were separate statistics relating to housing, Model Cities, free lunch and free breakfast, health, etc. The number of children from low-income families determined by these statistics was shown for only three sources: housing (33,011); free lunch and free breakfast (32,865); and ADC (32,352). Except for stating that these various sources had been considered, BOE did not set forth the criteria it had used in its consideration nor the rationale

for selection of the ADC data. SDE should have requested this information to make certain that the most appropriate data had been used. System weaknesses disclosed in these replies would have suggested to SDE the need for a special on-site audit to confirm the accuracy of reported data and to recommend system improvements.

Recommendations

We recommend that:

1. Arrangements be made to return to the Office of Education those Federal funds, totalling $1,161,917, which were used by ineligible school attendance areas in school years 1970-71 and 1971-72.

2. Steps be taken to develop and implement controls to prevent improper uses of ESEA Title I funds in the future. These controls should prescribe a comprehensive review by responsible officials of the data sources and methods used to determine attendance area eligibility. Where significant discrepancies or patterns of system weaknesses are disclosed in these reviews, special on site examinations should be made to confirm the accuracy of the data and the propriety of the methods.

The State Agency Comments

The State agency's reply to this finding indicated nonconcurrence in our conclusions and recommendations. In support of its narrative comments, the State agency (State Department of Education—SDE) submitted various exhibits which we have marked for ease of reference as Exhibits A to E. We are setting forth verbatim, as follows, SDE's comments on each audit exception category. SDE's complete reply inclusive of the related exhibits is incorporated in this report (page [35] under Appendix A.

"Lafayette Street School

The Draft Audit Report states that Lafayette Street School was ineligible for Title I funds for the school year 1970-71 because its concentration of children from low income families (23.5%) was below the districtwide average (25.5%). Upon reexamination, we find that the low income percentage for Lafayette School was incorrectly stated in the 1970-71 application. The percent should have been stated as 41.4%. Enclosed in support is data from the 1970 census report.

"Expenditures for Non-Title I Schools

Our review of the Newark expenditures for 1970-71 does not indicate that Title I funds were allocated to non-Title I schools. I have enclosed for your examination a section of the fiscal year 1971 audit report for Newark. As you will note, the report indicates (item 2) that allocations were made only against approved projects. I have also included for your review the Title I Budget Distribution for 1970-71 which indicates that funds were not scheduled for any of the schools in question.

"Non-Eligibility of 10 schools listed in the 1971-72 Title I Application.

Your report indicated that auditors recalculated the eligibility of ten schools and found them to be below districtwide low income average. It is clear from the information included that only AFDC data was used in the recalculation. The Newark application specifically indicated that a number of data sources, in addition to AFDC, were used. They were Housing Statistics, Model Cities Statistics, Free Lunch and Breakfast Statistics, Incidents of Foreign Born and Non-English Speaking Students, Health Statistics, Unemployment and Underemployed Sta-

tistics. Page 4b of that application is included for your review.

We concur that there were 445 children identified as AFDC in the Madison Attendance area. These were but a portion of the total low income population which is more accurately reflected by the average daily free lunch attendance (919) for the Madison School. I have included free lunch data for the Madison School.

The situation referred to above applies to the cited secondary schools, also. Although Clinton Place Junior High School identified only 491 students from AFDC data, these children were a part of a total of 1,032 low income children residing in the attendance area. I have again attached free lunch data. It is our contention that if auditors had considered data other than AFDC, they would have determined that each of the 10 schools cited was eligible as listed.

Department Staff has undertaken to provide accurate responses to what we consider serious allegations. In each case, schools of the district in question have been visited. It is our conclusion that poverty during the period in question was so widespread that there were a few schools truly ineligible. The district did attempt to follow regulations in the development and provision of services. In the process they may not have been as definitive as some of us would require. Nevertheless, I am assured that their actions were consistent with the applicable laws and regulations."

Our comments on the SDE position, keyed to the above headings, are presented below:

Lafayette Street School

SDE's comments indicate that careful examination of all data sources used in the determination of attendance area eligibility would have disclosed that the low-income percentage for Lafayette Street School was incorrectly stated. In support of this statement SDE submitted ". . . data from the 1970 census report . . . ." The SDE position is not valid since the 1970 census data report was not one of the eight sources identified in the application as those used to determine attendance area eligibility.

In its Title I application for school year 1970-71, BOE stated that it had determined attendance area eligibility ". . . on the basis of the best available information . . . ." BOE had pointed out in a special note in the application that the 1970 census data was not then available. Accordingly, SDE's comment that the low-income percentage for Lafayette Street School, as supported by the 1970 census data, should have been stated as 41.4 is not valid.

If this comment infers that the later availability of the 1970 census data showed the need to recalculate the low-income percentage for Lafayette, the requirement would also have been applicable to *all other* schools and would have produced a revised district-wide average. The City would have had to submit an amended application to SDE, showing the revised calculations and identifying the information sources which had been used. Since an amended application was not submitted to SDE for approval, the data shown in the original application must have been considered valid.

Expenditures for Non-Title I Schools

We agree with the statements by SDE that Title I funds ". . . were not scheduled for any of the schools in question . . . ." Exhibit C, showing the planned budget distribution for school year 1970-71, omits these schools. Our finding did not state that these schools were im-

properly included in the budget. Rather, it pointed out that these schools used Title I funds even though they had been excluded from the application and were therefore ineligible to receive Title I services.

Our analysis of expenditures showed that Title I funds had in fact been expended at these schools. This was authenticated by our comparison of financial data as shown in BOE's Budget Status Report which listed these school expenditures and as shown in the final project expenditures report submitted to SDE. The comparison follows:

	Totals Shown in		
	Budget Status Report	Report of Expenditures	Difference
Approved Project Amount	$9,046,097	$9,046,097	$ —0—
Total Funds Expended	$8,105,308	$8,105,308	$ —0—
Total Funds Committed *	312,330	312,330	—0—
Total Funds Expended and Committed	$8,417,638	$8,417,638	$ —0—
Total Carry-Over to Fiscal Year 1972	$ 628,459	$ 628,459	$ —0—

* Committed funds represent encumbrances

The City presented expenditures and encumbrances in the Budget Status Report in two breakouts: by line item; and by object code, e.g., salaries, textbooks, etc. for each school. Line item totals shown in the annual Report of Expenditures (ESEA Forms 1 and 2) to SDE were derived from the Budget Status Report. Since the reports were in agreement, it is apparent that the expenditures for the 10 ineligible schools, as shown in the Budget Status Report, were also included by line item in the annual Report of Expenditures.

Our analysis of the Budget Status Report indicated that Title I funds used by these 10 schools, included in the expenditures total shown above, were expended for salaries ($40,950) and other costs ($71).

Non-Eligibility of 10 Schools Listed in the 1971-72 Title I Application

We do not agree with the SDE position that our calculations of attendance area eligibility are invalid because they were based on AFDC statistics. SDE's exception is based on the grounds that we had not considered various other sources of data which the City had carefully examined and had used, in addition to the AFDC statistics, in arriving at its eligibility determinations. In support of its statement that these various sources had been used and their use specifically indicated in the application, SDE submitted with its reply page 4b of the application. The statements on this attachment (Exhibit D) contradict the position advanced by SDE.

The part of the application submitted by SDE is particularly important since in it the City states the method used in selecting attendance areas for Title I projects. As previously discussed in the finding, the City clearly certified in this part of the application that after examination of eight sources of data it had settled on one. Page 4b of the application stated the decision as follows: "The criterion used in qualifying schools was based on statistics on Aid for Dependent Children supplied by the Essex County Welfare Board." The seven data sources which had been examined but *not* selected for use in determining attendance area eligibility included, as shown on page 4b, housing statistics, free lunch and free breakfast statistics, and other low-income indicators.

As demonstrated in the finding, in the illustration for Madison Street School and in the various computations shown under Chart A, BOE based its low-income percentages exclusively on AFDC data. We had no valid basis to use for our audit determinations on information criterion other than the one selected by the City and approved by SDE. Our audit finding was not concerned so much with the data source selected for use as with the way the data was used. In this context, the SDE reply

did not comment on the basic flaw in BOE's eligibility determinations described in the audit report, namely the use of mathematically unacceptable ratios for computing low-income eligibility.

SDE's statement that ". . . there were 445 children identified as AFDC in the Madison attendance area . . ." misreads the data presented in the illustrative computation for Madison Street School. The basic mathematical flaws in the ratio used by BOE, as shown in our illustrative recomputation for Madison Street School, warranted recognition by SDE. As shown in the audit report, these 445 children represented only those AFDC children attending Madison Street School and did not include other AFDC children in the Madison Street School attendance area who according to their ages were eligible to attend the school but were enrolled in other schools, e.g. schools for the handicapped.

We do not question SDE's assertion that during the period covered by our audit poverty was widespread in the district. This incidence of poverty therefore necessitated closer attention to the calculation of low-income percentages to insure use of Title I funds in eligible low-income attendance areas with the greatest concentrations of educationally disadvantaged children.

OTHER MATTERS

During the discussion of audit results at the exit conference, the Commissioner of Education notified us that the State agency's application review procedures relating to selection of target areas had been strengthened after the period covered by our audit. As substantiation, he later forwarded to us, for our review, copies of the State agency's Guidelines for Approval of ESEA Title I Program Application for fiscal years 1974 and 1975, respectively. We found these documents to be generally similar to those issued in earlier years and without clear evidence that the quality of the State agency review had improved.

APPENDIX A

[SEAL]

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
225 West State Street
Trenton, N.J.

Office of the Commissioner

December 10, 1974

Mr. Bernard Luger
Regional Audit Director
Department of Health, Education
and Welfare
26 Federal Plaza
New York, New York 10007

Dear Mr. Luger:

This acknowledges receipt of the HEW Audit Report of Title I ESEA for the period September 1, 1970 to August 31, 1973.

For purposes of response I have grouped audit exceptions by fiscal year, categories as indicated in your report, audit exception amounts and page numbers. They are:

Fiscal Year 1971—Lafayette Street School ($91,266) page 7.

Fiscal Year 1971—EXPENDITURES FOR NON TITLE I SCHOOLS ($41,021) page 8

Fiscal Year 1972—Non eligibility of 10 schools listed in 1971-1972 application ($1,029,630) pages 9-18

Lafayette Street School

The Draft Audit Report states that Lafayette Street School was ineligible for Title I funds for the school year 1970-71 because its concentration of children from low

income families (23.5%) was below the districtwide average (25.5%). Upon reexamination, we find that the low income percentage for Lafayette School was incorrectly stated in the 1970-71 application. The percent should have been stated as 41.4%. Enclosed in support is data from the 1970 census report. (Exhibit A)[1]

Expenditures for Non-Title I Schools

Our review of the Newark expenditures for 1970-71 does not indicate that Title I funds were allocated to non-Title I schools. I have enclosed for your examination a section of the fiscal year 1971 audit report for Newark. As you will note, the report indicates (item 2) that allocations were made only against approved projects. I have also included for your review the Title I Budget Distribution for 1970-71 which indicates that funds were not scheduled for any of the schools in question. (Exhibits B and C)[1]

Non-Eligibility of 10 schools listed in the 1971-72 Title I Application.

Your report indicated that auditors recalculated the eligibility of ten schools and found them to be below districtwide low income average. It is clear from the information included that only AFDC data was used in the recalculation. The Newark application specifically indicated that a number of data sources, in addition to AFDC, were used. They were Housing Statistics, Model Cities Statistics, Free Lunch and Breakfast Statistics, Incidents of Foreign Born and Non-English Speaking Students, Health Statistics, Unemployment and Underemployed Statistics. Page 45 of that application is included for your review. (Exhibit D)[1]

We concur that there were 445 children identified as AFDC in the Madison attendance area. These were but

[1] Exhibit identification shown by HEW Audit Agency to facilitate reference.

a portion of the total low income population which is more accurately reflected by the average daily free lunch attendance (919) for the Madison School. I have included free lunch data for the Madison School. (Exhibit E)[1]

The situation referred to above applies to the cited secondary schools, also. Although Clinton Place Junior High School identified only 491 students from AFDC data, these children were a part of a total of 1,032 low income children residing in the attendance area. I have again attached free lunch data. It is our contention that if auditors had considered data other than AFDC, they would have determined that each of the 10 schools cited was eligible as listed.

Department Staff has undertaken to provide accurate responses to what we consider serious allegations. In each case, schools of the district in question have been visited. It is our conclusion that poverty during the period in question was so widespread that there were a few schools truly ineligible. The district did attempt to follow regulations in the development and provision of services. In the process they may not have been as definitive as some of us would require. Nevertheless, I am assured that their actions were consistent with the applicable laws and regulations.

Sincerely yours,

/s/ Fred G. Burke
FRED G. BURKE
Commissioner of Education

EDITOR'S NOTE

PAGES 38 thru 50 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

EXHIBIT 67

A. ESTIMATED NUMBER OF ELEMENTARY SCHOOL-AGE CHILDREN (5-13)
B. ESTIMATED NUMBER OF DISADVANTAGED ELEMENTARY SCHOOL-AGE CHILDREN (5-13)
C. PERCENTAGE OF ELEMENTARY SCHOOL-AGE CHILDREN (5-13) WHO ARE DISADVANTAGED
D. SCHOOL RANK - NUMBER OF DISADVANTAGED CHILDREN
E. SCHOOL RANK - PERCENTAGE OF DISADVANTAGED CHILDREN
F. TOTAL NUMBER OF NON-WHITE ELEMENTARY SCHOOL-AGE CHILDREN (5-13)
G. TOTAL NUMBER OF PRE-SCHOOL AGE CHILDREN (UNDER 5)
H. TOTAL NUMBER OF SCHOOL-AGE CHILDREN (5-17)
I. SCHOOL GRADE INDEX (G/H)
J. TOTAL ATTENDANCE AREA POPULATION
K. NON-WHITE PERCENTAGE OF TOTAL POPULATION
L. AVERAGE NUMBER OF PERSONS PER HOUSEHOLD
M. PERCENTAGE OF CHILDREN UNDER 18 NOT LIVING WITH MALE PARENT

	SCHOOL NAME	A	B	C	D	E	F	G	H	I	J	K	L	M
11	ARLINGTON AVE	962	390	40.5	31	23	225	532	1436	0.4	7742	16.5	2.43	27
101	BROADWAY-BROADWAY JR	1649	600	40.5	12	21	1123	503	2276	0.4	6920	60.9	3.52	38
111	BURNET STREET	1527	746	48.9	6	6	931	522	2065	0.4	8291	50.6	2.65	40
121	CAMDEN ST-WEST KINNEY JR	1236	502	40.4	17	15	1133	713	1655	0.4	4642	92.7	3.75	46
131	CENTRAL AVE	913	445	48.2	25	7	625	439	1345	0.3	3787	66.0	3.64	34
141	CHANCELLOR AVE	2030	356	17.5	37	45	1600	1123	2728	0.4	10445	81.6	3.31	24
151	CHARLTON STREET	625	288	45.8	42	15	600	364	855	0.4	3407	95.7	2.67	41
171	CHRISTOPHER COLUMBUS	925	163	17.6	48	44	124	569	1332	0.4	7171	9.1	2.91	13
181	CLEVELAND-WEST KINNEY JR	1206	616	49.6	14	9	1237	723	1749	0.4	4334	97.8	3.44	54
21	ALEXANDER STREET	1232	182	14.8	45	47	96	605	1307	0.3	8763	5.8	3.34	13
201	BAYLOR STREET	1352	760	56.4	6	3	867	695	1848	0.4	7031	52.4	2.56	34
211	EIGHTEENTH AVE-WEST KINNEY JR	256	140	54.6	49	2	253	116	342	0.3	997	97.5	3.22	52
221	ELLIOTT ST-BROADWAY JR	1456	322	22.4	39	42	155	806	2047	0.4	9928	11.4	2.73	20
231	FIFTEENTH AVE-SOUTH 7TH ST	1406	459	32.6	23	23	1255	899	1843	0.5	5421	90.8	3.79	52
241	FOURTEENTH AVE	719	299	41.6	41	18	637	423	951	0.4	2690	88.3	3.78	49
251	FRANKLIN-WEBSTER JR	2090	779	37.3	7	25	623	1336	2945	0.5	12273	24.0	3.10	29.
261	GARFIELD	1506	302	24.0	35	39	665	941	2183	0.4	9614	30.1	2.99	26.
271	TUBMAN-GARVEY	1269	468	36.5	20	23	1179	742	1632	0.4	4832	92.3	3.81	47.
281	HAWKINS ST	1552	734	47.3	9	12	505	786	2157	0.4	7254	25.1	3.30	26.
291	HAWTHORNE AVE	1760	374	21.3	33	43	1655	943	2401	0.4	8136	92.9	3.66	37.
31	ANN STREET	1428	439	30.7	26	33	16	736	2144	0.3	10341	0.9	3.11	7.
301	LAFAYETTE STREET	1372	572	41.6	16	19	185	748	2042	0.4	9423	10.8	3.21	11.
351	LINCOLN	1575	231	14.7	44	47	21	691	2387	0.3	11750	1.0	3.00	9.
361	MADISON-HUDSON-SOUTH 7TH AVE JR	2540	841	33.1	13	31	2420	1206	3455	0.3	11406	91.6	3.52	32.
361	MAPLE AVE	2571	351	14.8	38	46	2213	1501	3654	0.4	13456	85.2	3.17	24.
41	AVERY AVE-CLINTON PL JR	1501	549	36.6	10	26	1448	952	2010	0.5	6424	96.7	3.68	44.

"ESTIMATED DISADVANTAGED CHILDREN" IS THE NUMBER OF CHILDREN LIVING IN CROWDED HOUSING AVERAGED WITH THE NUMBER LIVING IN LOW RENT (UNDER $ 50/MONTH) AND LOW VALUE (UNDER $10000) HOUSING.

PRODUCED BY APPLIED DYNAMICS, INC., WASHINGTON, D.C.

EXHIBIT B

ELEMENTARY AND SECONDARY EDUCATION ACT (P.L. 89-10) PROGRAMS

The records submitted to us disclosed that:

1. Obligations reported were incurred during the fiscal year or project period for which the project was approved and, upon liquidation, were properly adjusted.
2. All obligations made for Federally supported Elementary and Secondary Education Act projects were made against approved projects.
3. Costs, such as salaries, travel, etc., were correctly prorated.

Examination of records was made in accordance with minimum audit requirements set forth by the State Department of Education on Elementary and Secondary Education Act operations.

The Elementary and Secondary Education Act financial exhibits contained herein (Exhibits A-14 through A-18) represent a true statement of the financial position pertaining to projects under Titles I, II, VIA and VIB of the Elementary and Secondary Education Act of 1965, P.L. 89-10.

During the year, the Board was allocated $9,589,400.00 of Federal funds for special education programs for educationally deprived children as follows:

	Title I	Title II	Title VI-A	Title VI-B	Total
Federal funds Cash Advanced to June 30, 1971	$9,400,360.00 6,645,062.00	$102,780.00 102,780.00	$10,550.00 --	$75,710.00 26,000.00	$9,589,400.00 6,773,842.00
Receivable at June 30, 1971	$2,755,298.00	$ --	$10,550.00	$49,710.00	$2,815,553.00

Expenditures amounted to $3,958,548.68 and are classified as follows:

	Budget	Expenditures	Balance
Administration	$ 250,077.00	$ 113,529.69	$136,547.31
Instruction	5,693,152.00	5,573,429.06	119,722.94
Attendance and Health Services	453,604.91	452,698.35	906.56
Transportation	146,981.00	140,907.50	6,073.50
Operation of Plant	48,284.00	41,499.93	6,784.07
Maintenance of Plant	110,114.80	102,326.35	7,788.45
Fixed Charges	844,754.00	685,439.76	159,314.24
Food Services	121,100.00	119,242.45	1,857.55
Community Services and Civic Activities	1,790,537.29	1,610,083.78	180,453.51
Capital Outlay	130,795.00	119,391.81	11,403.19
	$9,589,400.00	$3,958,548.68	$630,851.32

EXHIBIT B-1

1. The detail of the individual accounts comprising the opening balances of the Tuition Receivable Account at July 1, 1970 did not agree with the prior year's audit report in the amount of $778.00.

   We recommend that this difference be reconciled and the necessary adjustments recorded.

2. At June 30, 1971, there was $9,777,625.00 due from the City of Newark representing the balance of the proceeds of a bond sale in March 1971.

   We recommend that proceeds from the sale of bonds be promptly deposited with the Custodian of School Moneys in accordance with R.S. 18:24-47.

IMPROVEMENT AUTHORIZATIONS

1. At June 30, 1971, there were unfunded deferred charges of $755,00.00 representing improvement authorizations that were recorded by the Board before bond ordinances were adopted by the Municipal Council.

   We recommend that improvement authorizations be recorded after the adoption of bond ordinances by the Municipal Council and that no disbursements be made until such time.

FEDERAL PROJECTS

1. During our examination of expenditures for Federal programs, we determined that not all reports requesting reimbursement for these expenditures were filed on a timely basis.

   We recommend that reports requesting reimbursement from Federal agencies be filed on a timely basis in order to minimize delays in collection.

ELEMENTARY AND SECONDARY EDUCATION ACT 1965

1. During our audit of the Elementary and Secondary Education Act funds, we noted there are receivables of $137,763.64 for the 1968-1969 program that are disputed by the Federal Government.

   If the claim for the receivable is denied by the Government, we recommend that the balance be cancelled by the Board by resolution.

2. At June 30, 1971, the Board did not issue a blanket order for program expenditures for the period July 1, 1971 to August 31, 1971 as required under the Act for those programs ending August 31, 1971.

   We recommend that the Board comply with the Act.

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EXPENDITURES FOR
TITLE I SCHOOLS

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

EXHIBIT C

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET DISTRIBUTION 1970-1971

ELEMENTARY SCHOOLS	B.R.L. Programmed Reading	Partici- pating Student-	Project Coordinator 02120005	Project/Dem. Development Teachers 02130001		Substitutes 1/10 @ $35 02130301		Clerk Steno 02150101		Teacher Aides 1 Ea.-Kdg. ½ Ea. 1st Gr. 02160003		Community Aides 02160009	Textbooks @ $6/P.S. 02200001	Instruc- tional Sup. @ $6/P.S. 02100007	Misc. Expenses @ $1/P.S. 02500102	E.S.E. Activities @ $1/P.S. 02500321	Trans- portation @ $4/P.S. 05200305	Telephone Base $100 06411401	New Equipment @ $1/P.S. 12600101	Totals
				No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.								
Abington Avenue		298	1	$ 14,450	2	$ 25,670	30	$ 1,050	1	$ 5,005	2	$ 6,106	1	$ 3,053	$ 1,788	$ 1,788	$ 298	$ 1,192	$ 1,192	$ 125	$ 298	$ 62,0
Avon Avenue		413	1	14,450	2	25,670	41	1,435	1	5,005	6	18,318	1	3,053	2,478	2,478	413	1,652	1,652	150	413	77,2
Belmont-Runyon		340	1	14,450	2	25,670	34	1,190	1	5,005	8	24,424	1	3,053	2,040	2,040	340	1,360	1,360	125	340	81,4
Bergen Street		524	1	14,450	3	38,505	52	1,820	1	5,005	8	24,424	1	3,053	3,144	3,144	524	2,096	2,096	150	524	99,0
Bragaw Avenue		580	1	14,450	3	38,505	58	2,030	1	5,005	6	18,318	1	3,053	3,480	3,480	580	2,320	2,320	150	580	94,3
Broadway Elementary	X	306	1	14,450	2	25,670	31	1,085	1	5,005	6	18,318	1	3,053	1,836	1,836	306	1,224	1,224	125	306	74,5
Burnet Street	X	294	1	14,450	2	25,670	29	1,015	1	5,005	4	12,212	1	3,053	1,764	1,764	294	1,176	1,176	125	294	68,0
Camden Street		515	1	14,450	3	38,505	52	1,820	1	5,005	15	45,795	1	3,053	3,090	3,090	515	2,060	2,060	150	515	120,1
Central Avenue		227	1	14,450	2	25,670	23	805	1	5,005	3	9,159	1	3,053	1,362	1,362	227	908	908	125	227	63,3
Charlton Street	X	413	1	14,450	2	25,670	41	1,435	1	5,005	6	18,318	1	3,053	2,478	2,478	413	1,652	1,652	150	413	77,2
Clinton Avenue	X	216	1	14,450	2	25,670	25	875	1	5,005	7	21,371	1	3,053	1,476	1,476	216	924	924	125	216	74,0
Clinton Street		374	1	14,450	3	38,505	37	1,295	1	5,005	7	21,371	1	3,053	2,244	2,244	374	1,496	1,496	125	374	97,1
Eighteenth Avenue		337	1	14,450	2	25,670	34	1,190	1	5,005	6	18,318	1	3,053	2,022	2,022	337	1,348	1,348	125	337	75,3
Fifteenth Avenue		555 455	1	14,450	3	38,505	50	1,750	1	5,005	11	33,583	1	3,053	2,970	2,970	455	1,980	1,980	150	455	107,4
Fourteenth Avenue		355	1	14,450	2	25,670	39	1,365	1	5,005	5	15,265	1	3,053	2,310	2,310	385	1,540	1,540	125	385	73,1
Franklin		279	1	14,450	2	25,670	28	980	1	5,005	5	15,265	1	3,053	1,674	1,674	279	1,116	1,116	125	279	71,0
Hawkins		360	1	14,450	2	25,670	35	1,260	1	5,005	6	18,318	1	3,053	2,160	2,160	360	1,440	1,440	125	360	75,1
Hawthorne Avenue		562	1	14,450	3	38,505	56	1,960	1	5,005	6	18,318	1	3,053	3,372	3,372	562	2,248	2,248	150	562	93,1
Hudson Street		179	½	7,225	½	6,418	15	525	1	5,005	-		1	3,053	894	894	149	596	596	100	149	25,0
Lafayette Street		440	1	14,450	2	25,670	44	1,540	1	5,005	6	18,318	1	3,053	2,640	2,640	440	1,760	1,760	150	440	77,0
Madison Annex		85	½	7,225	½	6,418	9	315	½	5,005	9	27,477	½	1,527	510	510	85	340	340	100	85	27,0
Madison Avenue	161	444	1	14,450	3	38,505	44	1,540	½	5,005	-		½	1,526	2,664	2,664	444	1,776	1,776	150	444	69,0
Peterboro		303	1	14,450	3	38,505	30	1,050	1	5,005	10	30,530	1	3,053	1,818	1,818	303	1,212	1,212	125	303	59,0
Miller Street		515	1	14,450	3	38,505	59	2,065	1	5,005	9	27,477	1	3,053	3,510	3,510	585	2,340	2,340	150	585	103,0
Morton Street		410	1	14,450	2	25,670	41	1,435	1	5,005	4	12,212	1	3,053	2,460	2,460	410	1,640	1,640	150	410	71,0
Newton Street	X	307	1	14,450	2	25,670	31	1,085	1	5,005	4	12,212	1	3,053	1,842	1,842	307	1,228	1,228	125	307	69,0
Oliver Street		259	1	14,450	2	25,670	26	910	1	5,005	4	12,212	1	3,053	1,554	1,554	259	1,036	1,036	125	259	67,0
Peshine Avenue		610	1	14,450	3	38,505	61	2,135	1	5,005	9	27,477	1	3,053	3,660	3,660	610	2,440	2,440	175	610	109,0
Putnam Street		675	1	14,450	3	38,505	68	2,380	1	5,005	10	30,530	1	3,053	4,050	4,050	675	2,700	2,700	175	675	109,0
Robert Treat	X	492	1	14,450	3	38,505	49	1,715	1	5,005	4	12,212	1	3,053	2,952	2,952	492	1,968	1,968	150	492	85,0
Roseville Avenue		157	1	14,450	1	12,835	16	560	1	5,005	8	24,424	1	3,053	942	942	157	628	628	100	157	45,0
South Street	X	169	1	14,450	1	12,835	11	385	1	5,005	4	12,212	1	3,053	654	654	169	676	676	100	169	50,0
South 16th Street		814	1	14,450	4	51,340	81	2,835	1	5,005	11	33,583	1	3,053	4,884	4,884	814	3,256	3,256	200	814	123,0
South 17th Street		619	1	14,450	3	38,505	62	2,170	1	5,005	8	24,424	1	3,053	3,714	3,714	619	2,476	2,476	175	619	101,0
South 18th Street		269	1	14,450	2	25,670	27	945	1	5,005	6	18,318	1	3,053	1,614	1,614	269	1,076	1,076	175	269	73,0
[illegible] Avenue		298	1	14,450	3	38,505	30	1,050	1	5,005	6	18,318	1	3,053	1,788	1,788	298	1,192	1,192	175	298	67,0
[illegible] Avenue		440	1	14,450	3	38,505	44	1,540	1	5,005	6	18,318	1	3,053	2,640	2,640	440	1,760	1,760	150	440	90,0
[illegible] Street		197	1	14,450	1	12,835	20	700	1	5,005	2	6,106	1	3,053	1,182	1,182	197	788	788	100	197	66,0
Waverly Avenue	X	339	1	14,450	1	12,835	23	805	1	5,005	4	12,212	1	3,053	1,794	1,794	299	836	836	175	299	53,0
Wilson Avenue		366	1	14,450	2	25,670	37	1,295	1	5,005	4	12,212	1	3,053	2,196	2,196	366	1,464	1,464	175	366	69,0
Not Participating - B.R.L.																						31

EXHIBIT C-1

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET DISTRIBUTION 1970-1971

SECONDARY SCHOOLS SENIOR HIGH SCHOOLS	Participating Students	Project Coordinator 02120005 No.	Amt.	Project/Rem. Development Teachers 02130001 No.	Amt.	Substitutes 1/10 @ $35 02130001 No.	Amt.	Work(12 mo.) Experience Teachers 02140202 No.	Amt.	Clerk 02130101 No.	Amt.	Textbooks @ $6/P.S. 02200001	Instructional Sup. @ $6/P.S. 02400007	Misc. Expenses @ $1/P.S. 02500039	E.E.E. Activities @ $6/P.S. 02500021	Transportation @ $6/P.S. 05200005	Telephone Base $100 06400401	New Equipment @ $1/P.S. 12400101	Total
Barringer High	586	1	$ 14,450	1	$ 12,835	59	$ 2,065	-		1	$ 5,085	$ 3,516	$ 3,516	$ 586	$ 2,344	$ 2,344	$ 150	$ 586	$ 47,1
Central High	653	1	14,450	1	12,835	65	2,275	1	$ 14,455	1	5,085	3,918	3,918	653	2,612	2,612	175	653	63,4
East Side High	357	1	14,450	1	12,835	36	1,260			1	5,085	2,142	2,142	357	1,428	1,428	125	357	41,4
South Side High	473	1	14,450	1	12,835	47	1,645	1	14,455	1	5,085	2,838	2,838	473	1,892	1,892	150	473	59,4
Vocational High	410	1	14,450	1	12,835	41	1,435	1	14,455	1	5,085	2,460	2,460	410	1,640	1,640	150	410	57,4
West Side High	405	1	14,450	1	12,835	41	1,435	1	14,455	1	5,085	2,430	2,430	405	1,620	1,620	150	405	57,2
TOTALS SENIOR HIGH SCHOOLS	2,834	6	$ 86,700	6	$ 77,010	289	$ 10,115	4	$ 57,820	6	$ 30,510	$ 17,304	$ 17,304	$ 2,884	$ 11,536	$ 11,536	$ 900	$ 2,824	$ 326,5
JUNIOR HIGH SCHOOLS																			
Broadway Jr. High	159	1	$ 14,450	1	$ 12,835	16	$ 560			1	$ 5,085	$ 954	$ 954	$ 159	$ 636	$ 636	$ 100	$ 159	$ 36,5
Clinton Place Jr. High	441	1	14,450	3	38,505	44	1,540			1	5,085	2,646	2,646	441	1,764	1,764	150	441	69,4
Seventh Avenue Jr. High	278	1	14,450	2	25,670	28	980			1	5,085	1,668	1,668	278	1,112	1,112	125	278	52,4
Webster Jr. High	168	1	14,450	2	25,670	17	595			1	5,085	1,008	1,008	168	672	672	100	168	49,5
TOTALS JR. HIGH SCHOOLS	1,046	4	$ 57,800	8	$ 102,680	105	$ 3,675			4	$ 20,340	$ 6,276	$ 6,276	$ 1,046	$ 4,184	$ 4,184	$ 475	$ 1,046	$ 207,5
TOTALS SECONDARY SCHOOLS	3,930	10	$144,500	14	$ 179,690	394	$ 13,790	4	$ 57,820	10	$ 50,850	$ 23,580	$ 23,580	$ 3,930	$ 15,720	$ 15,720	$ 1,375	$ 3,930	$ 534,18

EXHIBIT C-2

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

Budget Distribution 1970-1971

SPECIAL SCHOOLS	E.R.L. Programmed Reading 02200009	Participating Students	Project Coordinator 02120006		Project/Rem. Development Teachers 02130001		Substitutes 1/10 @135 02130701		Work(12 mo.) Experience Teachers 02160702		Clerk Steno 02150101		Teacher Aides ½ Ea. Edg. ½ Ea. 1st Gr. 02160001		Textbooks @26/P.S. 02200001	Instructional Sup. @26/P.S. 02600007	Misc. Expenses @1/P.S. 02500109	E.E.E. Activities @24/P.S. 02500321	Transportation @24/P.S. 05200105	Telephone Base $100:$1/P.S. 06102101	New Equipment 12100101	
			No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.									
Alyea Street		23	½	$ 7,225	½	$ 6,418	2	$ 70			½	$2,562	2	$ 6,106	$ 138	$ 138	$ 23	$ 92	$ 92	$ 100	$ 23	$	
Arlington Avenue		44	½	7,225	½	6,417	4	140			½	2,563	2	6,106	264	264	44	176	176	100	44		
Boylan Street		92	½	7,225	½	6,418	9	315			½	2,562	2	6,106	552	552	92	368	368	100	92		I
Branch Brook		69	½	7,225	½	6,417	7	245			½	2,563	2	6,106	414	414	69	276	276	100	69		
Bruce Street Deaf		42	½	7,225	½	6,418	5	175			½	2,562	2	6,106	294	294	49	196	196	100	49		
Elliott Street Blind		21	-		-		2	70			1	5,095	1	3,053	126	126	21	84	84	100	21		
Girls' Trade	X	51	½	7,225	½	6,417	9	315			½	2,562	2	6,106	546	546	91	364	364	100	91		
Montgomery Street		313	1	14,450	1	12,835	31	1,085	1	14,455	1	5,095	3	9,159	1,878	1,878	313	1,252	1,252	125	313		
South Eleventh Street		98	½	7,225	½	6,418	10	350			½	2,563	3½	9,159	588	588	98	392	392	100	98		
South Market Street		46	½	7,225	½	6,417	5	175			½	2,563	2	6,106	276	276	46	184	184	100	46		
Wickliffe Street		32	½	7,225	½	6,417	3	105			½	2,563	1	3,053	192	192	32	128	128	100	32		
Woodland Avenue		32	½	7,225	½	6,417	3	105			½	2,563	1	3,053	192	192	32	128	128	100	32		
TOTALS SPECIAL SCHOOLS		$3,888	910		6	$86,700	6	$ 77,009	90	$3,150	1	$14,455	7	$35,596	23	$70,219	$ 5,460	$ 5,460	$ 910	$ 3,640	$ 3,640	$ 1,225	$ 910	$

EXHIBIT C-3

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET DISTRIBUTION 1970-1971

Public Schools	Participating Students	Project Coordinator 02120026		Project/Ten. Development Teachers 02127101		Substitutes 1/10 @ $35 02130001		Clerk Steno 02150101		Teacher Aides ½ Ea. Reg. ½ Ea. 1st Gr. 02160007		Community Aides 02160009		Textbooks @ $5/P.S. 02200701	Instructional Sup. @ $5/P.S. 02400007	Misc. Expenses @ $1/P.S. 02500109	E.E.E. Activities @ $4/P.S. 02500121	Transportation @ $4/P.S. 05200121	Telephone Base $100 05100401	New Equipment @$1/P.S. 12600101	Totals
		No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.								
...en of Angels	100	½	$ 4,575	½	$ 4,200	10	$ 350	½	$ 2,562	1	$ 3,053	1	$ 3,053	$ 600	$ 600	$ 100	$ 400	$ 400	$ 100	$ 100	$ 20,873
...Aloysius	133	½	4,575	½	4,200	13	455	½	2,562	1	3,053	1	3,053	798	798	133	532	532	100	133	20,505
...Ann	133	½	4,575	½	4,200	13	455	½	2,562	1	3,053	1	3,053	798	798	133	532	532	100	133	20,994
...Antonious	118	½	4,575	½	4,200	12	420	½	2,562	1	3,053	1	3,053	708	708	118	472	472	100	118	20,560
...Augustine	66	½	4,575	½	4,200	7	245	½	2,562	1	3,053	1	3,053	396	396	66	264	264	100	66	19,220
Charles Borromeo	124	½	4,575	½	4,200	12	420	½	2,562	2	6,106	1	3,053	744	744	124	496	496	100	124	23,725
Columba	239	½	4,575	½	4,200	14	490	½	2,562	2	6,106	1	3,053	834	834	139	556	556	100	139	24,124
Lucy	89	½	4,575	½	4,200	9	315	½	2,562	1	3,053	1	3,053	534	534	89	356	356	100	89	19,797
Mary	110	½	4,575	½	4,200	11	335	½	2,562	1	3,053	1	3,053	660	660	110	440	440	100	110	20,328
Michael	255	1	9,150	1	8,400	26	910	½	2,562	3	9,159	1	3,053	1,536	1,536	255	1,024	1,024	125	256	33,972
Patrick	93	½	4,575	½	4,200	9	315	½	2,562	1	3,053	1	3,053	558	558	93	372	372	100	93	19,854
...Teresa	109	½	4,575	½	4,200	11	385	½	2,741	2	6,106	1	3,053	654	654	109	436	436	100	109	23,250
...ham School	-		-		-		-	½	2,562		-		-	-	-	-	-	-	-	-	2,562
...LS FOR PUBLIC SCHOOLS	1,670	6½	$ 59,475	6½	$ 54,600	147	$5,145	6½	$33,052	17	$ 51,901	12	$ 35,636	$ 8,820	$ 8,820	$ 1,470	$ 5,880	$ 5,880	$ 1,225	$ 1,470	$ 274,374

EXHIBIT C-4

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

SCHOOLS FOR BILINGUAL PROGRAMS	Participating Students	Project Coordinator 02120035 No.	Amt.	Clerk Steno 02150101 No.	Amt.	Textbooks @ $6/P.S. 02200031	Instructional Sup. @ $6/P.S. 02400007	Misc. Expenses @ $1/P.S. 02500309	E.E.E. Activities @ $4/P.S. 02500321	Transportation @ $1/P.S. 05200305	Telephone Base $100 06400401	New Equipment @ $1/P.S. 12400301	Totals
Halsey Elementary - Bilingual	119	½	$ 7,225	½	$ 2,543	$ 714	$ 714	$ 119	$ 476	$ 476	$ 100	$ 119	$ 12,486
Broadway Jr. High - Bilingual	61	½	7,225	½	2,543	366	366	61	244	244	100	61	11,210
Morton Street - Bilingual	185	1	14,450	½	2,543	1,110	1,110	186	744	744	100	185	21,185
Franklin - Bilingual	149	1	14,450	½	2,543	894	894	149	596	595	100	149	20,321
McKinley - Bilingual	346	1	14,450	½	2,543	2,076	2,076	346	1,384	1,384	125	346	24,730
Oliver Street - Bilingual	127	1	14,450	½	2,543	762	762	127	508	508	100	127	19,937
South Street - Bilingual	61	1	14,450	½	2,543	366	366	61	244	244	100	61	18,435
Sumner Avenue - Bilingual	217	1	14,450	½	2,543	1,302	1,302	217	868	868	125	217	21,652
Webster Jr. High - Bilingual	87	½	14,450	½	2,543	522	522	87	348	348	100	87	19,007
NEWARK SCHOOLS FOR BILINGUAL PROGRAMS	1,353	8	$115,600	4½	$22,887	$8,118	$ 8,118	$ 1,353	$ 5,412	$ 5,412	$ 950	$ 1,353	$ 149,203

EXHIBIT C-5

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET ESTIMATION 1970-1971

SCHOOL SUMMARY	Participating Students	Project Coordinator 02120006	Project/Rem. Development. Teachers 02130001	Substitutes 1/10 @ $35 02130901	Work Exp. Tchrs. (12 mo.) 02160702	Clerk Steno 02150101	Teacher Aides ½ Ea. Kdg. & 1st Gr. 02160007	Community Aides 02160009	Textbooks @ $6/P.S. 02200001	Instructional Sup. @ $6/P.S. 02400007	Misc. Expenses @ $1/P.S. 02500109	E.E.E. Activities @ $4/P.S. 02500121	Transportation @ $4/P.S. 05200105	Telephone Base $100 06100401	New Equipment @ $1/P.S. 12400101	B.E.E. Programmed Reading 02200009	Totals
ELEMENTARY	15,185	$ 563,550	$1,155,151	$ 53,270	-	$ 198,315	$ 732,720	$ 119,063	$ 91,110	$ 91,110	$ 15,185	$ 60,740	$ 60,740	$ 5,425	$ 15,185	$ 31,112	$3,192,6
SECONDARY	3,930	144,500	179,890	13,790	$ 57,870	50,850	-	-	23,580	23,580	3,930	15,720	15,720	1,375	3,930	-	534,4
SPECIAL	910	65,700	77,009	3,150	14,455	15,536	70,219	-	5,460	5,460	910	3,640	3,640	1,225	910	3,888	312,2
NEW PUBLIC	1,470	59,475	54,600	5,145	-	33,052	51,901	36,636	8,820	8,820	1,470	5,880	5,880	1,225	1,470	-	276,3
No. of Personnel		(6½)	(110½)		(5)	(6½)	(280)	(51)									
SUB TOTALS	21,495	$854,225	$1,456,450	$75,355	$72,775	$317,813	$854,840	$155,703	$128,970	$128,970	$21,495	$85,980	$85,980	$9,250	$21,495	$35,000	$4,313,8
Early Childhood Eq. Title III	-	-	(8) $80,000	$ 4,620	-	-	-	-	-	-	-	-	-	-	-	-	$ 84,6
			$1,536,450	$79,975													
NEW CAMP CITY BUDGET																	
Bilingual Program	1,353	(8)$115,600	-	-	-	(3½)$22,887	-	-	$ 8,118	$ 8,118	$ 1,353	$ 5,412	$ 5,412	$ 950	$ 1,353	-	$ 169,2
Experimental Classes @ Robert Treat School		-	-	-	-	-	(8) $24,495	-	-	$ 4,000	-	$ 1,800	$ 1,200	-	-	-	$ 31,4

EXHIBIT C-6

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET DISTRIBUTION 1970-1971

SCHOOL SUMMARY	Participating Students 02120006	Project Coordinator 02120006	Project/Rem. Development. Teachers 02130101	Substitutes 1/10 @ $35 02130001	Work Exp. Tchrs. (12 mo.) 02110202	Clerk Steno 02150101	Teacher Aides ½ Ea. Kdgt. & Ea. 1st Gr. Aides 02160007	Community Aides 02160009	Textbooks @ $5/P.S. 02200001	Instructional Sup. @ $5/P.S. 02140007	Misc. Expenses @ $1/P.S. 02500109	E.E.E. Activities @ $4/P.S. 02500121	Transportation @ $4/P.S. 05200305	Telephone Base $100 06100101	New Equipment @ $1/P.S. 12500101	B.R.L. Programmed Reading 02200009	
ELEMENTARY	15,185	$ 563,550	$1,155,151	$ 53,270	-	$ 198,315	$ 732,720	$ 119,067	$ 91,110	$ 91,110	$ 15,185	$ 60,740	$ 60,740	$ 5,425	$ 15,185	$ 31,112	$
SECONDARY	3,930	146,500	179,690	13,790	$ 57,820	50,850	-	-	23,580	23,580	3,930	15,720	15,720	1,375	3,930	-	
SPECIAL	910	86,700	77,009	3,150	14,455	35,596	70,219	-	5,460	5,460	910	3,640	3,640	1,225	910	3,833	
NON PUBLIC	1,470	59,475	56,600	5,145	-	33,052	51,901	36,636	8,820	8,820	1,470	5,880	5,880	1,225	1,470	-	
No. of Personnel		(61½)	(116½)		(5)	(62½)	(200)	(51)									
SUB TOTALS	21,495	$954,225	$1,466,450	$75,355	$72,275	$317,813	$854,840	$155,703	$128,970	$128,970	$21,495	$85,980	$85,980	$9,250	$21,495	$35,000	$
Early Childhood Kdg. Title III	-		(8) $80,000	$ 4,620	-	-	-	-	-	-	-	-	-	-	-	-	$
			$1,545,450	$79,975													
PTCH CARRY OVER BUDGET																	
Bilingual Program	1,353	(8)$115,600	-	-	-	(6½)$22,807	-	-	$ 8,118	$ 8,118	$ 1,353	$ 5,412	$ 5,412	$ 950	$ 1,353	-	$
Experimental Classes at Robert Treat School	-	-	-	-	-	-	(8) $24,424	-	-	$ 4,000	-	$ 1,800	$ 1,200	-	-	-	
GRAND TOTALS	22,848	$960,225	$1,466,450	$75,355	$72,275	$317,813	$879,264	$155,703	$137,088	$140,088	$22,848	$91,392	$91,392	$10,200	$22,848	$35,000	$

SELECTION OF ATTENDANCE AREAS FOR TITLE I PROJECTS

The attendance areas selected for Title I projects are those areas which, on the basis of the best available information have high concentrations of children from low-income families.

Eligible schools have been listed in order of highest concentration. The criterion used in qualifying schools was based on statistics on Aid for Dependent Children supplied by the Essex County Welfare Board.

Before selecting this method for qualifying attendance areas and schools within those attendance areas the following data were also examined:

- Housing statistics supplied by Applied Urbanetics
- Model Cities Statistics (Entire City of Newark is now a Model Neighborhood)
- Free lunch and free breakfast statistics (32,865 served daily)
- High percentage of Puerto Rican children
- High incidence of foreign born and non-English speaking children
- Health Statistics
- Unemployment and Underemployed statistics

It should be noted that in comparing the statistics and projections compiled by Applied Urbanetics and the A.D.C. statistics provided by the Essex County Welfare Board, that each complements (possibly validates) the other.

	Applied Urbanetics	ADC Statistics
Children from low-income families 5-17	33,011	32,352
District Wide Percentage	32.6%	33.3%

EXHIBIT E

AVERAGE DAILY PARTICIPATION	Fish Type "A"	Fare	Daily Receipts
	47,316	7,169	3,318
	40,156	8,581	5,478
	46,481	10,113	5,225
	44,003	8,845	3,861
	40,451	8,205	3,424
	42,352	7,771	3,241
	42,277	8,324	4,046
	52,851	12,156	4,668
SUNDAY FIRST SECTION	96,300	11,363	4,313
	32,613	8,816	4,155
	34,711	11,234	6,132
	35,167	10,156	4,273
	15,167	5,127	2,168
	41,382	10,021	5,376
	98,977	71,419	4,197
	43,123	8,315	3,372
	36,123	10,231	3,372
	41,347	9,113	4,163
AVG	38,521	11,241	6,137
	42,623	9,913	6,103
	44,321	12,744	7,116
	40,431	8,101	5,142
	36,177	12,616	6,121
	41,163	9,116	3,243
	45,167	15,112	7,322
	39,361	8,911	3,472
	41,321	10,711	3,342
	42,441	11,321	6,145
	44,623	11,842	3,511
	42,167	9,621	6,103
	40,113	9,312	2,616
	43,377	10,115	6,103
	41,063	10,211	2,711
	40,341	8,112	3,253
	39,341	8,113	4,352
	42,341	8,112	3,253
	43,341	8,113	4,352
	43

NEW JERSEY STATE DEPARTMENT OF EDUCATION

Audit Control No. 50006-02

	No. of Copies
HEW Action Official	
Deputy Commissioner Bureau of School Systems 400 Maryland Avenue, S.W. Washington, D.C. 20202	4
Other Parties	
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Regional Director	1
Regional Commissioner for Education	2
Director, Planning Systems Assistant Secretary for Planning & Evaluation Department of Health, Education, & Welfare Room 4639, North Building 330 Independence Avenue, S.W. Washington, D.C. 20201	1
New Jersey State Department of Education	2
Audit Agency	
Division of Audit Coordination	7
Regional Office	2

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF EDUCATION
Washington, D.C. 20202

Jun. 11, 1976

Our Reference: ACN: 50006-02
Honorable Fred G. Burke
Commissioner of Education
State Department of Education
Trenton, New Jersey 08625

Dear Commissioner Burke:

Reference is made to the Health, Education, and Welfare Audit Agency report of audit of the operation and administration of the Title I, Elementary andy Secondary Education Act program as it relates to the Selection of Target Areas in the Newark LEA in your State for the period September 1, 1970 to August 31, 1973.

The decisions set forth in this letter are based on a thorough examination of the audit report and all information your agency has submitted for purposes of resolving the pending audit exceptions including its most recent response of May 7, 1976. We are not in a position to announce our final determinations with respect to those unsettled matters included in the above-cited audit report. Our decision is that it will be necessary for your agency to refund $1,161,917 to the Office of Education in order to settle this audit. In Enclosure No. 1 to this letter, you will find a detailed discussion of our determinations.

If your agency concurs with our final determinations, you should submit payment in the amount of $1,161,917 to the U.S. Office of Education. Should your agency wish to ap-

peal our final decision you may request a hearing. The procedure for a hearing on appeal of final audit determinations is contained in Enclosure No. 2 to this letter.

Sincerely,

/s/ Robert R. Wheeler
ROBERT R. WHEELER
Deputy Commissioner
for School Systems

Enclosures

Enclosure No. 1

FINAL AUDIT DETERMINATIONS

Audit Control No: 50006-02

State: New Jersey

Program: Title I, ESEA

Period Covered: September 1, 1970 to August 31, 1973

SELECTION OF TARGET AREAS—$1,161,917

The auditors' review disclosed that the Newark LEA used Title I funds totaling $1,161,917, in school years 1970-71 and 1971-72, in schools which did not meet the eligibility requirements established in Section 116.17 of the Title I regulations. The auditors asserted that critical review of project applications for these periods by officials of your agency and the LEA would have disclosed information gaps and a lack of detail on the methods used to determine eligibility of school attendance areas. The auditors indicated that although source data in support of the 1970-71 eligibility determinations were not available, it was clear on the face of the project application for that year that one school, based on the low-income percentage shown, was improperly classified as eligible and received $91,266 in Title I program funds. The auditors noted that during school year 1970-71, ten schools received $41,021 in Title I funds even though they did not appear on the LEA's approved project application and were, therefore, ineligible. The auditors also discovered that in school year 1971-72, the Newark LEA, by using improper ratios, misclassified 13 schools as eligible to receive $1,029,630 in Title I funds. The breakdown is as follows:

Expenditures by Ineligible School (Lafayette) Shown as Eligible in Project Application—$91,266

The auditors found that because the LEA failed to retain the essential documentation, the reliability of the districtwide percentage of low-income children, stated in the application of 25.5 percent, could not be confirmed. In addition, the auditors could not validate the low-income percentage computed for each attendance area. The auditors, therefore, could not determine which of the 74 schools listed in the Title I application were actually eligible for Title I funds. However, they noted that among the schools included in the application there was one, the Lafayette Street School, which on the face of the application showed a low-income percentage of 23.5 percent, which was two full percentage points below the stated districtwide average of 25.5 percent. The auditors, therefore, concluded that the use by this school of $91,266 in Title I funds was in violation of Section 116.17(d) of the Title I regulations. Your agency's earlier responses regarding this matter were reviewed and determined to be inadequate. Your agency's latest response, dated May 7, 1976, does not refute the auditors' finding. Instead it states that your agency had verbally "cited" the district regarding its target area selection source material and apparently "considered the poor economic environment in Newark at that time" as an adequate basis upon which to approve the expenditure of Title I funds. This response is clearly not adequate to refute the auditors' finding and, in fact, supports their contention that your agency's review of target area selection processes was deficient. Therefore, your agency must refund the sum of $91,266 to the Office of Education.

Expenditures by Ten Ineligible Schools Excluded from Application—$41,021

The auditors' review disclosed that during school year 1970-71 ten schools, which were not eligible to receive

Title I funds because they were not listed on the Title I application as constituting Title I school attendance areas, expended Title I funds totaling $41,021 in violation of Sections 116.17(a) and (c) of the Title I regulations. Your agency's earlier response to this finding was inadequate. The supplemental response of May 7, 1976, does not attempt to refute the auditors' finding. It merely asserts that your agency has encountered difficulty in developing a response to the auditors and requests the documentation used in their review. In view of the fact that your agency (1) has direct access to the Newark LEA's target area selection material, (2) indicated in your earlier response (December 10, 1974) that it had already reviewed the material in question, and (3) failed to request copies of the audit workpapers at the exit conference or at the meeting held in Washington, D.C., on November 19, 1975, or during the period which passed between that meeting and your supplemental response, we do not feel that it is appropriate to delay resolution of this matter further. Therefore, your agency must refund the sum of $41,021 to the Office of Education.

Expenditures Due to Improper Identification of Eligible School Attendance Areas—$1,029,630

The auditors found that the method used by the Newark LEA to determine the eligibility of attendance areas for school year 1971-72 deviated from that set forth in Title I regulatory mandates, particularly Section 116.17(d) of the Title I regulations. The LEA utilized AFDC statistics from the County Welfare Board which listed the total number of children in the AFDC category enrolled at each regular public elementary and secondary school. These statistics, however, were incomplete since they excluded those children on AFDC rolls who were attending nonpublic, or special educational schools or who had dropped out of school. The limitations of the statistics suggested to the LEA the use of an alternative ratio presented in ESEA INST. L203.1, section 1.1. This section recognized that in some instances (as did not exist in Newark during the period in question) schools may not have well-defined attendance area boundaries or receive numbers of children from outside the areas that have been designated to those schools. In such cases, it may be necessary to use a ratio for ranking attendance areas which is based on the percentage or number of children from low-income families actually enrolled in those schools rather than the number of such children eligible to attend the public school serving that attendance area. The auditors pointed out that while the former ratio was not permitted to be used by the LEA under ESEA INST. L203.1, it was a reasonable alternative under the circumstances.

However, the auditors found that in its attempt to apply the selection system described by INST. L203.1, the LEA devised hybrid ratios which deviated from the method specified. The auditors revealed that the ratios utilized by the LEA had basic mathematical flaws which tended to inflate the low-income percentages for individual elementary and secondary school areas and thus to increase improperly the number of eligible attendance areas. Based on their recalculation of the target area selections for the Newark LEA, the auditors determined that ten elementary schools and three secondary schools had low-income percentages lower than the district wide average and were ineligible for Title I funding. The auditors recommended that your agency be required to refund the $1,029,630, which represents the Title I funds expended at schools which were determined to be ineligible to receive such funds.

Your December 10, 1974, response to the auditors was based on the assertion that the auditors only utilized AFDC data in arriving at their recalculation rather than the several sources listed in the Newark application and that the number of children identified as eligible was too low. In support of your agency's position, is the pertinent

page of the Newark LEA project application. However, this document clearly states that "the criterion used in qualifying schools based on statistics on Aid for Families of Dependent Children was supplied by the Essex County Welfare Board." It further states that, "Before selecting this method for qualifying attendance areas and schools with those areas the following data (those noted in your response) were also examined." In view of the obvious support which your submission gave to the auditors' recalculations, we could not accept your earlier response as adequate to refute their findings.

Your agency's supplemental response of May 7, 1976, provides an ex post facto recalculation of the target area selection figures for the schools found to be ineligible by the auditors. However, your response states that your agency used in the denominator of its calculations "the Elementary School enrollment *plus the percentage of students attending the Junior High and High School from that eligible attendance area.*" (emphasis supplied) This is exactly that same type of improper count which gave rise to the initial audit exception and which this Office has already indicated is not permissible under the regulations or INST. L203.1. Therefore, your agency must refund the sum of $1,029,630 to the Office of Education.

[SEAL]

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
225 West State Street
Trenton, N.J.

OFFICE OF THE COMMISSIONER

October 21, 1976

Mr. Robert R. Wheeler
Deputy Commissioner
Office of Education
Department of Health, Education
and Welfare
Washington, D.C. 20202

Re: ACN: 50006-02 (Newark Board of Education, Title I Audit)

Dear Mr. Wheeler:

Enclosed please find the New Jersey State Department of Education's application for review of the "Final Audit Determinations" based upon an audit of Newark Title I programs for the period September 1, 1970 to August 31, 1973. Attached to that application is a copy of the agency notification.

Please note that by a letter dated August 23, 1976, David S. Pollen, Chairman of the Audit Hearing Board granted this agency an additional 60 Days in which to prepare and submit documentation to support its request for a hearing.

Sincerely,

/s/ Fred G. Burke
FRED G. BURKE
Commissioner

Attachments

NEW JERSEY DEPARTMENT OF EDUCATION
APPLICATION FOR REVIEW
OF FINAL AUDIT DETERMINATION
BASED ON ACN: 50006-02

October 21, 1976

INTRODUCTION

This is an application by the New Jersey Department of Education (State) for a review of final audit determinations of the Office of Education (OE) of the Department of Health, Education and Welfare dated June 11, 1976 and received by the State on June 28, 1976. The conclusions expressed in that communication were based largely on an audit of the use of funds in Newark appropriated under Title I of the Elementary and Secondary Education Act, 20 U.S.C. 241a *et seq.*, during fiscal years 1970-1973. The State expressed its desire to take an appeal from those determinations, and a hearing was requested pursuant to 45 C.F.R. 16 *et seq.* by a letter dated July 22, 1976. Appendix A.

The audit report on which OE's final determination was based was received by the New Jersey Commissioner of Education on October 21, 1974. The auditors recommended that the State refund Title I funds in excess of $1.1 million which were spent on schools allegedly ineligible to receive funds under federal law in the school years 1970-71 and 1971-72. The auditors asserted generally that the local educational agency (LEA) had misclassified as eligible a number of schools that did not satisfy the requirements of Title I regulations and that the state educational agency (SEA) had failed to act to prevent such improper use of program funds.

The State's initial response, dated December 10, 1974, provided an answer based on such data as were available. Thereafter, a meeting was held on November 19, 1975 between HEW and representatives of SEA. Neither the individuals who prepared the answer of December 10, 1974 nor those who met at HEW are now employed by SEA. Therefore, the State was under a considerable disadvantage when it filed its final response to the audit on May 7, 1976. It had been provided with no record of what transpired at that meeting. OE had also failed to furnish documentation which formed the basis of one audit exception. Since so much of the final determination is

couched in conclusory language, the State is still unable to make a meaningful response. By contrast, OE has been supplied with all relevant documentation at the State's disposal.

The final audit determination, requesting the return of $1,161,917 was based upon three specific audit exceptions: (1) expenditures by an allegedly ineligible school (Lafayette Street School) in school year 1970-71 ($91,266); (2) expenditures by ten schools not listed on the 1970-71 application ($41,201); and (3) expenditures due to identification of Title I target areas through an allegedly impermissible formula ($1,029,630). Each of these exceptions will be considered in some detail later in this application for review. However, it is sufficient to note here that the State, in its final response to the auditors, provided a recalculation for the supposedly ineligible schools for 1971-72 (the exception for which comprises the far greater part of the total amount requested). The formula used for that recalculation was permissible under regulations existing at the time of the application, and the accuracy of the statistics used is not challenged by OE. In short, there has never been as satisfactory rebuttal provided to the recalculation.

From this brief review of the history of this audit and application for review, as well as the contents of the preliminary audit report and final determinations, it is apparent that the State has been severely disadvantaged in its attempts to provide specific responses to each allegation. Also prejudicial to the State's effort is the passage of time taken between steps by the federal agencies. The State is faced with the task of meeting conclusions—some only partially supported by documentation, others supported not at all—based upon allegations contained in an audit report completed more than two years ago. The LEA applications containing the material commented upon in that report were completed, respectively, five and six years ago. It should also be noted that SEA officials attempted to administer those programs in the face of a confusing, and often conflicting, mix of federal regulations and pronouncements.

Beyond the procedural objections stated above, the State is determined to defend the educational needs of the school children of Newark and to show the validity of Newark's Title I program during fiscal years 1970-73. Since the OE rebuttal to the State's last response is largely unsatisfactory, it is compelled to restate many of its objections to the preliminary audit report. In doing so, the State is confident of its ability to demonstrate the propriety of its actions and that it fulfilled its statutory mandate under both existing federal guidelines and the local conditions to which those guidelines were applied.*

DISCUSSION

It appears that OE has accepted virtually all of the conclusions arrived at by the auditors. Therefore, this application must be one for review of that audit report as well as of OE's final determinations. But before each specific finding is answered, it is essential that the circumstances surrounding the Title I program across the state and the general economic climate in Newark during the subject years be described.

Some of the difficulties uncovered by the audit were no doubt engendered by some degree of confusion in the administration of the program at all levels. State and local agencies were faced with conflicts between federal statutes and regulations governing the program and informal administrative pronouncements periodically issued to interpret them. During this early phase of Title I, there was a complete absence of clear regulations. Discrepancies between those existent have been well-documented elsewhere

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* OE has never informed the State of the basis for its refund request although repeatedly asked to do so. The State is confident that it will prevail in this application, and therefore will not address the question of refunds at this time. However, it is aware of no authority for this refund procedure and reserves its right to challenge OE's authority to employ it at a later date.

and are thoroughly familiar to educators at the federal level.

The version of Title I which confronted the Newark LEA at the beginning of the 1970 and 1971 school years, through its lack of specificity, added to the confusion that attended the implementation of the law. It contained no clear definition either of the type of child Title I funds were to serve or the type of area to which they were to be applied. Federal regulations adopted pursuant to the Act provided some guidance, but were still lacking in specificity. For example, 45 C.F.R. 116.1 (i) defines "educationally deprived children" as:

> ". . . those children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age. The term includes children who are handicapped or whose needs for such special educational assistance result from poverty, neglect, delinquency, or cultural or linguistic isolation from the community at large."

and 45 C.F.R. 116.1(v) defines "project area" as:

> ". . . the attendance area, or combination of attendance areas, having a high concentration of children from low-income families which, without regard to the location of the project itself, is designated as the area whose children are to be served by the project . . . ."

Neither the statute nor these regulations in effect during the relevant fiscal years sets forth precise criteria to be considered by an LEA in determining whether a child qualifies as "educationally deprived" and whether a project area contains a high enough percentage of low-income children so that it might be considered eligible.

The HEW audit agency apparently based its findings on AFDC data that OE, in its final audit determination, admitted were incomplete because they did not reflect the

total number of low-income families with school-aged children in the district. One suggestion for dealing with such unsatisfactory statistical information, offered by Harold Howe, U.S. Commissioner of Education, in the *ESEA Title I Program Guide #44*, was addressed to the chief school officers of all states:

> "In some cases, income data are not available or are out-of-date and the number of children from low-income families will need to be estimated on the basis of the number of such children who are receiving Aid to Families with Dependent Children (AFDC) or who are receiving free lunches. *Housing, health, or employment statistics may also be used in estimating the number of children from low-income families in each attendance area. . . .*
>
> Normally the attendance units should be ranked according to percentages of low-income families. . . . If necessary for reasons of equity the attendance units determined to have high concentration of low-income families may include some areas ranked on one basis and some on the other."
> (Emphasis added).

Eschewing complete dependence on such incomplete data, local Title I coordinators fell back on their own assessment of the needs of their districts and the locations of low-income populations. To a great extent, the Newark LEA depended on this practice, which was expressly approved of by Commissioner Howe in a letter dated February 27, 1967:

> "The degree of concentration from low-income families may be estimated, if better data are not available, on the basis, of the number or percentage of children from low-income families actually attending each of the schools being operated by the applicant local educational agency." (Emphasis added).

Other OE communications as well recognized the probable need for estimating data. In "The Schoolman's Guide

to Federal Aid, Part II. Implementation of Projects," reprinted from the December 1965 issue of *School Management* and distributed to all superintendents in January 1966, the director of program operations in OE's Bureau of Elementary and Secondary Education said the following about the problems in data collection:

> "Schoolmen shouldn't be struck with inaccurate data—and they are not. They can conduct their own poverty census and *they don't have to stick with the $2,000 income factor*. They can use some other factor, or factors, that serve their purpose better. For example: How many families have incomes under $4,000 a year? They can go to the welfare agency and find out how many children are on welfare programs. Even housing data will give valid clues. *All* of this type of data can give a valid index of poverty.
>
> If accurate information, even of this type, is not available for some schools, or for some attendance area, the superintendent can meet with the school principal and other personnel, put together whatever information they have and come up with a *pooled judgment* as to the schools with the highest concentrations of children from low-income families. This is acceptable but I want to stress that it should be used *only* as a last resort.
>
> For example, in order to qualify for participation in a Title I project, a school's attendance area must show a percentage of children from low-income families that is at least as high as the over-all percentage for the district. This is causing some trouble because administrators are finding that some of their concentrated pockets of poverty are in schools that do not, using available statistics, show a relatively high *percentage* of low-income children. In this situation the pooled judgment of the district's staff could be used to show that this particular school qualifies for participation in a Title I program." (Emphasis original).

Also critical of OE's use of *only* AFDC as a determinant of eligibility is Report No. 93-805 on the Education Amendments of 1974 by the House Labor and Education Committee, which stated:

> "The committee bill has reduced the use of AFDC counts for distributing Title I funds because of the inequitable distribution of funds which has resulted in the last several years and also because we believe that the AFDC program in its present state does not provide accurate or reliable statistics on poverty throughout the country. Federal administrators of the program concur in this conclusion since they appeared before the committee and urged that AFDC statistics not be used for distributing funds." 1974 U.S. Code Cong. & Admin. News 4101.

The reason for this sudden loss of confidence was the realization that the welfare program left in the state a wide discretion to decide who is eligible and the amount of assistance granted to each such individual.

In addition, in a letter * dated June 14, 1974, to the New Jersey Title I Coordinator, Richard L. Fairley, Director of OE's Office for the Disadvantaged, recommended that the state agency instruct LEA's that besides primary source data (AFDC, census), weight should also be given to such secondary source data as unemployment and health statistics, school lunch data, and school surveys.

That this was done for the subject years is borne out by the Newark LEA applications, which evidence a conscientious effort to locate areas which had a high concentration of children from low-income families on the basis of the best information *then* available. For example, the 1970-71 application shows that the following factors,

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* See Appendix B, page 7.

all of which were approved of as criteria by OE, were utilized:

1) AFDC statistics supplied by the Essex County Welfare Board
2) Free lunch and free breakfast programs
3) Model Cities data
4) Housing statistics
5) Bussing of children from areas with high concentration of foreign-born and non-English speaking children
6) Health survey and statistics on school-age children.

In addition, Newark conducted its own survey to gauge the need for Title I-type aid. The Interim Progress Reports, Newark BOE Title I by Planners Associates, Inc. indicated that a large segment of Newark's school-age population fell below national norms in reading and mathematics. For example, a city-wide test administered in October 1969 indicated that an average of 80 out of 100 third-graders fell below the national norms. Among sixth-graders, the below average rate fell to 90 out of 100. Reported data also showed that a majority of children in *all* of the project areas suffered from at least one of the following educational handicaps:

1) insufficient knowledge of English
2) poor speech patterns
3) lack of an ability to communicate verbally with others
4) low levels of aspiration and self-esteem
5) health, home and cultural handicaps

With all of this considered, the reported AFDC District-wide low-income percentage for 1970-71 (25.5) is but a poor reflection of the conditions in Newark at that

time. It ignores in particular the aforementioned conditions and statistics considered by LEA and gathered from a variety of sources as well as the severe conditions of overcrowding in the elementary schools. Of the 82,314 children registered in Newark public schools during school year 1969-70, a majority, 51,886, were in grades kindergarten through sixth. As has been acknowledged often by educators, class size can be an excellent indication of the caliber of education.

Statistics cited in the 1971-72 Title I application are even more indicative of the climate of both the schools and the economy of Newark. They show a jobless rate for the previous year of 14 percent, a rate double that needed to qualify under the Economic Development Act. Another 35,000 residents were earning $3,000 per year or less. And in 1971, the Model Cities program in Newark was expanded to include the entire city.

Other data further dramatize the situation in the city. Newark was then second only to Washington, D.C. in percentage of black population (54.2). Another 11 percent of the population was of Hispanic background. The city also had the highest percentage of slum housing in the nation, the highest incidence of crime, and the second highest birthrate.

One other statistic was especially considered by the local administrators and serves to show the inherent unreliability of any count of the city's low-income population. Newark had in 1970-71 the highest population turnover in the nation. Model Cities data indicate that mobility rates reached as high as 80 percent for schools in the Title I area. For this reason alone, LEA had no choice but to assume high concentrations of low-income families in all attendance areas and to attempt to spread the benefits of Title I as broadly as possible to assure that most educationally deprived children would be served. Indeed, the type of Title I project ultimately developed was tailored to such a mobile population.

Then, as now, the city was faced with imminent bankruptcy. The entire school system was overburdened and hardly able to maintain the quality or quantity of services that would ameliorate the learning, health, and nutritional problems of its school children. Schools with relatively less disadvantaged students hardly had more opportunity to satisfy these needs.

It is also apparent that under the meaning of the Act and its scope, which Congress intended to have been broad, the whole of Newark could have been considered a Title I area.

In the 1965 House Committee Report on Public Law 80-10, later to become the Elementary and Secondary Education Act, it was said:

> "Under the terms of the legislation, a local public school district may use funds granted to it for the broad purpose of programs and projects which will meet the educational needs of educationally deprived children in those school attendance areas in the district having high concentrations of children from low-income families. It is the intention of the proposed legislation not to prescribe the specific types of programs or projects that will be required in school districts. Rather, such matters are left to the discretion and judgment of the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from State to State and district to district. What may be an acceptable and effective program in a school district serving a rural area may be entirely inappropriate for a school district serving an urban area, and vice versa. *There may be circumstances where a school system is basically a low-income area and the best approach in meeting the needs of educationally deprived children would be to upgrade the regular program.* On the other hand in many areas the needs of educationally deprived children will not be satisfied by such an approach." 1965 U.S. Code Cong. & Admin. News 1454 (emphasis added).

The 1966 House Committee Report on amendments to Title I noted local problems in determining where and how Title I funds should be used in meeting the objectives of the program. The Committee repeated that Title I programs were to be designed at the local level and that the program was to be administered flexibility:

> *"We specifically pointed that there may be circumstances where a whole school system is basically a low-income area and in which the best approach might be to upgrade the whole school system.* The first year programs involving a general upgrading of whole school systems were discouraged by the Office of Education. The construction of facilities to house Title I programs was permitted only sparingly. This restricted approach was necessitated by limited funds. In the next two years, especially in fiscal year 1968, more funds will be available and more children will be included in Title I programs. It is expected that more general upgrading of school systems and more construction will be permitted. *It is the feeling of the committee that when 30 or 40 percent of the children in the district are from low-income families, all of the children in the district could be considered disadvantaged and the whole school system could be upgraded."* 1966 U.S. Code Cong. & Admin. News 3846 (Emphasis added)

As has already been demonstrated, the Newark school system was one uniformly disadvantaged both educationally and economically. In school year 1971-72, AFDC data, which, if anything, understated the level of poverty in the district, showed a low-income percentage of over 33 percent, a level above that recommended by Congress in 1966 as one that should qualify the entire district as disadvantaged. Even the federal regulations applicable

that year, and so often cited in the preliminary and final audits, recognized that an entire school district could be considered a project area:

> ". . . *In certain cases, the whole of a school district may be regarded as an area having a high concentration of* [*children from low-income families*] *and be approved as a project area,* but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district." 45 C.F.R. 116.17(d) (emphasis added)

With these regulations and pronouncements before them, Newark school administrators proceeded to try to determine the appropriate target areas. It is apparent that their program as a whole met the Title I requirements in serving educationally deprived children, who were demonstrated to have been both highly concentrated throughout Newark and highly mobile among attendance areas.

In fact, there is every indication that Newark was precisely the kind of school district for which the Act was written. The House Committee Report on the Title I amendments of 1974 notes that two types of districts should especially be the targets for Title I funds: 1) districts which are exerting a great tax effort and have a minimal tax base and 2) districts where education costs more because of expensive programs (such as bilingual programs) or because of student transiency in the district as a whole. Newark certainly qualifies as a district of the first type. Its tax base has been rapidly shrinking, and Newark taxpayers have traditionally been burdened with the State's highest property tax rate. The rate of transiency has already been noted. As for the demands for bilingual education in the district, an informal survey completed in October 1969 showed that 12 out of the city's 29 elementary schools had a non-English speaking population of 14.4 percent or more. Since then, there has been a rapid influx of Spanish speaking people.

All of the foregoing indicates that the Newark program as a whole was clearly designed to serve not the general educational needs of the area, but "the special needs of children from low-income families" and to counteract "the impact the concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs." 20 U.S.C. 241(a). Indeed, no statement made in either the preliminary audit or final determination alleges that these purposes were not served.

One other thread of criticism which runs through the preliminary audit deserves some comment. The auditors repeatedly suggested that although the allegedly improper procedures in Newark ceased after school year 1971-72 and there was every indication that eligibility determinations for 1972-73 were properly made, there was no documentary evidence that this resulted from SEA action. Pronouncements from OE itself give lie to these assertions. In fact, so strenuous were SEA's efforts at compliance during these years that, by 1973, OE could characterize the newly instituted revision and application procedures as "exemplary." *

As early as April 1971, Sidney P. Marland, Jr., then U.S. Commissioner of Education expressed deep appreciation for the conscientious efforts being made by the State to correct deficiencies in the administration of Title I.** By June 7, 1971, SEA could demonstrate that numerous OE suggestions relative to the personnel, evaluation, and regulatory areas had been implemented.*** The process of administrative reorganization was essentially culminated by 1974. In a letter dated June 14th of that year, Richard L. Fairly, Director of OE's Division of Education for the disadvantaged, could report the following programs in these areas:

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* Appendix B, page 1.

** Appendix C, page 2.

*** Appendix D.

1) Fiscal management—the State had instituted satisfactory procedures, all consistent with federal guidelines, to maintain fiscal control and integrity.

2) Monitoring—the process in New Jersey was recognized as well above average.

3) Target area selection—state guidelines were entirely consistent with federal regulations.*

Thus, during the period of the audit, correspondence with OE indicates that SEA efforts at compliance with federal regulatory mandates were consistently praised and that State administrators were led to believe that they had cured all of the alleged insufficiencies. At the same time, OE staff summoned SEA employees to Washington to extract from them admissions that would later be used in the audit. The unfairness in this is evident.

In sum, given SEA administrative budget for these early years and the overwhelming confusion at all levels of regulation, it is hardly surprising that the State was in no position to monitor the implementation of the program in more than 500 school districts and that there may have been violations of a technical nature. The State was hard-pressed and thus forced to rely heavily on project applications, evaluations and periodic visits. With all this, it still must be stressed that the violations cited were only technical ones. That which was done in Newark was entirely consonant with the intent of the drafters of the Act and the spirit of the legislation itself. There are no allegations that economically and educationally deprived children were not served or that monies were diverted for illegal purposes.

The State believes that it has amply demonstrated that the Newark project as a whole met the requirements of Title I and that any further OE action with respect to the program in school years 1970-71 and 1972-73 is im-

* Appendix E, pages 3-5.

proper. However, in view of OE's continued insistence that Newark failed to comply with Title I requirements in those years, each audit exception will be considered individually.

I. REFUNDS REQUESTED AS A RESULT OF PAYMENTS TO ALLEGEDLY INELIGIBLE SCHOOLS (1970-71)

As a result of the audit of documents for the 1970-71 school year, OE requests the return of $91,266 in Title I program funds spent by Lafayette Street School and $41,-021 in expenditures by ten other schools.

Initially, the State asserts that OE is barred from recovery of any expenditures made during the 1970-71 school year should they prove to have been unauthorized. 20 U.S.C. 884 provides:

> "No State or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of the Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized."

This five-year statute of limitations was adopted to encourage HEW to make audits more promptly than had been the case and to remove the threat on school administrators of liability for payments received many years before.

By "final written notice" is meant the final determination of an intention to collect, communicated by OE to an SEA after its officials have met with HEW to discuss the preliminary audit exceptions. *Report of the House Education & Labor Committee*, Feb. 21, 1974, 1974 U.S. Code Cong. & Admin. News 4060-61.

Final written notice of OE's intention to collect was not received at the New Jersey Department of Education until June 28, 1976. Records in SEA's possession show

that it received final notification of the grant award on November 5, 1970 and that all Title I monies for programs conducted during the 1970-71 school year, which were the subject of the audit exceptions, were paid to the SEA before June 28, 1971 (five years before final written notice). Therefore, OE cannot collect on any alleged unauthorized uses of those fiscal 1970 and 1971 fund paid before the above-named date.

Although, as argued above, the Newark program met Title I requirement and, in any case, monies paid in school year 1970-71 cannot be recovered since the statute of limitations had run before OE's final written notice was received, the propriety of expenditures for the programs of that year will still be considered individually.

EXPENDITURES BY LAFAYETTE STREET SCHOOL

The auditors request a refund in the amount of $91,266 for payments made to Lafayette Street School because of its allegedly improper classification as eligible. Although the reported AFDC low-income percentage in this school's attendance area (23.5%) fell two points below the district-wide average, it was included on the basis of other factors, all of which were cited in LEA's 1970-71 application and all of which could be considered under existing regulations. Chief among these were the poor economic climate in Newark at the time and a large concentration of Hispanic and other non-English speaking minorities in that section of Newark. The inherent unreliability in the use of AFDC data is even more apparent in such an area as the one served by the Lafayette Street School. Many of its residents were ignorant of how to become welfare clients or evidenced resistance to signing up for welfare.

Furthermore, an OE review of SEA administrative techniques was not effected until March 17, 1971 and the report of that review not received until July 27, 1971, one year after SEA's approval of the Newark application. As had already been demonstrated, the SEA response to

that review was exemplary. It resulted in dramatic adjustments in the review procedures. See Appendix B. Certainly neither the State nor the local agency is without fault in this matter, but since the confusion of the 1970-71 school year, efficient methods of administration have been developed and implemented.

EXPENDITURES AT TEN OTHER SCHOOLS

The auditors also requested the return of some $41,201 as a result of payments made to ten schools made to schools allegedly ineligible to receive Title I funds. The State can only reiterate its former response to the conclusions arrived at by the auditors with respect to these schools—that it has not yet been afforded access to the documentation on which the audit was based. New Jersey Department of Education personnel who prepared the December 10, 1974 response and the two staff members who participated in the meeting with OE officials are no longer employed in the State Title I agency. The Department has been prejudiced by OE's failure to supply information and unable to prepare a meaningful response to the conclusions of the auditors.

The State has no way of knowing what transpired at the November 1975 meeting. Failure of SEA employees to request workpapers at that time is hardly a reason for OE to ignore repeated requests to do so since then. Such refusal is patently unfair and demeans the quality of the hearing to which the State is entitled.

II. EXPENDITURES REQUESTED DUE TO ALLEGEDLY ERRONEOUS IDENTIFICATION OF ATTENDANCE AREAS (1971-72)

The auditors first complain that the stated method of identification of eligible attendance areas deviated from the regulatory mandates of 45 C.F.R. 116.17(d). They further note that the AFDC statistics used by the LEA were incomplete in that they failed to take into account

eligible children in non-public or special education schools as well as those who had dropped out of school.

If anything, this last complaint, as the auditors admit, would tend to result in an underestimation of the number of AFDC children in each district. The effect of course is to make each LEA figure not reflective of the true level of poverty in each district so that there may have been excluded from the program several attendance areas which would have otherwise qualified.

The auditors also admit that the method ultimately used by LEA in 1971—a method of ranking attendance areas on the basis of the percentage of the number of children from low-income families actually enrolled in each school—was a reasonable alternative under the circumstances. Even in retrospect, this method seems not only a reasonable alternative, given the admitted inaccuracies in the AFDC account, but the only reliable alternative open to the local agency.

As section 1.1.1 of *ESEA Title I Program Guide # 44* indicates, the process of ranking by percentages is one that is *normally* used. It further states that all districts need not be ranked on the same basis—eligibility of some population areas may be determined on one basis, eligibility of others on another. This is precisely what was done. LEA employed available free lunch/breakfast, housing, health and unemployment statistics in a weighted formula in a manner consistent with the basic criteria set down by the Commissioner.

Furthermore, the auditors' characterizations of SEA's response of May 7, 1976 as an "ex post facto justification" based on the same errors "which gave rise to the initial audit exception" is both inaccurate and unfair. The calculations in the May 7 submission clearly indicated a correlation between the entire eligible school population in any given attendance area and the number of children from low-income families residing within that area. Although that was made clear in the SEA answer,

it bears reiteration now. To take but one example, the equation given for Madison School is as follows:

$$\frac{937}{1544 + (2389 \times .341)} = 39.7\%$$

The numerator comprises the total number of children from low-income families from Madison's attendance area; the denominator, the total of the elementary school enrollment *plus* the number of junior high and high school students which that attendance are contributed (i.e., 34.1% of those schools' total population of 2389). The auditors' recalculation, on the other hand, employed only AFDC data for elementary school children, measuring the number of elementary school pupils in each school against the total population of that school. In this case, it is the auditors who have ignored the directives of their own program guide by not employing a comparison the corresponding student populations of the attendance area as a whole.

Apart from that consideration, the State must point out that OE is, on one hand, condemning SEA for allowing a local agency to employ an allegedly improper ratio while, on the other, demeaning SEA's recalculation as an "ex post facto calculation" even though it is on the basis of the very type of formula OE calls for. That this recalculation comes after the fact renders it no less valid as a justification. The figures inserted into this revised formula were fully as accurate then as they are now. They serve to demonstrate that even though the formula LEA used may not have conformed exactly to existing federal specifications, the result reached was a just one. It was a result that was calculated to—and did—fulfill the purposes of the federal statute. The goals of Title I, as well as instructions on selection of target areas, were set out in the Title I Program Guide:

> "The purpose of the attendance area requirement is to identify the 'target populations' of children who

are to be considered for participation in Title I activities on the basis of educational deficiency and the need for special services."

In the final analysis, these ends were furthered by the ultimate distribution of the funds, whatever the target area selection method originally employed. The State believes that the need for Title I funds in these particular areas of Newark, if not in the city as a whole, has been amply justified by the recalculations submitted on May 7 and by the other factors set out in detail throughout this response.

In retrospect, it is easy to criticize the lack of SEA supervision over local programs five years ago. But such criticism does not take into account inherent monitoring limitations and the personnel shortage existent then. Nor does it consider that, by OE's own admission, the monitoring process has significantly improved since.

CONCLUSION

For all of the substantive and procedural reasons just set forth, the State urges that OE's final audit determination on the Newark Title I project be reviewed and that the audit exceptions sustained by OE be overruled.

APPENDIX A

July 26, 1976

Mr. Robert R. Wheeler
Deputy Commissioner
Office of Education
Department of Health, Education
and Welfare
Washington, D.C. 20202

RE: ACN: 50006-02 (Newark Board of Education, Title I Audit)

Dear Mr. Wheeler:

Your letter dated June 11, 1976 containing the Office of Education's final determination concerning the audit of the Newark Title I programs for the period September 1, 1970 to August 31, 1973 was received by the New Jersey State Department of Education on June 28, 1976. It would be appreciated if you could advise us under what authority your office is requesting payment of funds by this Department, since we have been unable to discover any source of such authority ourselves. In the meantime, we wish to preserve our right to a hearing on the final audit determination. On behalf of this Department, I am hereby requesting a hearing pursuant to 45 CFR 16 *et seq.*, which it is my understanding are the federal rules applicable to such a proceeding.

I am aware that these regulations require that this request be accompanied by a statement of the questions which will be the subject of such a hearing, together with "pertinent fact and reasons." As you know, the New Jersey educational system has been operating under extraordinary pressures for the past few months and particularly in the past weeks because of litigation which resulted in our entire system being virtually closed down on July 1, 1976. While the injunction which resulted in this closing has now been dissolved by the New Jersey

Supreme Court, my staff must give priority both to the problems created by that temporary closing and to implementation of the new Jersey Public School Education Act of 1975 which was delayed by the aforementioned litigation. Therefore, it would be appreciated if this agency could be given some time in which to prepare the appropriate documentation to support our request for a hearing. I should note that we continue to be hampered in this matter by our lack of information about the contents of the reports upon which the Newark audit was based, information which we have requested several times.

Sincerely,

FRED G. BURKE
Commissioner

cc: Jane Sommer, Esq.

FGB/gyc/M-8439

APPENDIX B

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF EDUCATION
Washington, D.C. 20202

Jul. 16, 1973

Mr. Jerome Jones
Office of ESEA, Title I
State Department of Education
Trenton, New Jersey 08625

Dear Mr. Jones:

This letter is a follow-up to the New Jersey Title I program review conducted during the week of March 19-23 by William Johnson, Terry Lynch, Edward Smith and Goldia Hodgdon of my staff. The team held extensive discussions with the Title I staff, reviewed selected documents, visited four local school districts, and had a very instructive experience in observing a SEA Title I team visit to one local district. The purpose of the OE team visit, as you know, was to assess the administration and implementation of the New Jersey Title I program with the intent of arriving at an understanding and making recommendations regarding steps to be taken in further strengthening program operations. We were especially interested in the actions that have been taken by the Department following the OE 1972 program review.

We were very pleased to find that the Department's October 6, 1972 response to our review letter of August 8, 1972 was corroborated in almost all instances by the team's findings at the SEA level during the March visit. It is particularly gratifying to be able to point to several critical areas of responsibility and action on the part

of Department personnel which hold promise for exemplary efforts by the State to provide strong leadership for the local school districts. Among those efforts which should be highlighted are: (1) the addition and reorganization of staff, including the provision of staff development opportunities and development of a management system for accomplishing broad objectives and appropriate tasks; (2) the revision of the *SEA Guidelines for Approval of ESEA Title I Program Application* and revision of the application form itself; (3) the development and employment of a comprehensive procedure for on-site visits and follow-up; (4) the formulation and refinement of SEA policy positions on a task force basis, utilizing and coordinating the expertise and experience available from immediate staff, directors of and specialists from other divisions within the Department, selected local Title I coordinators and parents, to a limited extent. While the team's observations during the March visit are generally reflective of the positive steps taken by the SEA since the previous program review, the remainder of this letter will also include observations, findings, and recommendations given for your consideration and action as indicated.

Financial Management, Auditing and Related Matters

Staff additions and reorganization have contributed to furthering the effectiveness of your accounting, disbursement and other fiscal responsibilities. The Department's goal for Fiscal 1973 to perform in-depth audits of 30 Title I programs with emphasis on the districts receiving the largest allocations represents a considerable increase over the nine districts audited during the previous year. The Department's March orientation session on financial auditing procedures for all staff should enhance the efforts of the two accountant auditors in the Division of Administration and Finance who have had to perform an almost impossible job. The 1972 review team's recommendations regarding the addition of at least one auditing position had not been accomplished at the time of the 1973 review visit.

The team was advised during the exit conference that those school districts receiving less than $4,000 allocation were instructed by the SEA to wait until April to submit applications for the use of their Fiscal 1973 funds. Whether this is new or temporary policy, this Office views such instructions as being discriminatory against those districts which want to use their funds but are not allowed to exercise their right to request them at the same time as all other districts. This situation suggests the need for the SEA to examine its staff functions with a view toward providing the necessary technical assistance which would result in the launching of programs during a given school year, rather than leaving the affected LEAs with the options of an abbreviated program for a few months duration or simply carrying over funds for the succeeding school year. Either option does not adequately address the needs of those identified children in need of services during each regular school year.

There are several other options that may be available to the local school districts in question. The SEA could: a) encourage the development of more cooperative projects, given favorable logistical circumstances; b) encourage the use of services of a part-time reading teacher or a tutorial experience for the children; c) provide for the services of a Department helping teacher on a more sustained basis; d) initiate a specially adapted in-service training experience for the regular classroom teachers and one or two para-professionals who have children who have been identified to be in need of supplementary instructional services; or e) provide for a training program for parents to follow through on (at home) instructional techniques they have observed in the classroom.

The recommendations for financial management and auditing concerns are that:

1. The SEA review its widely distributed publication, "Guidelines for Fiscal Management," issued by the Division of Business and Finance, for the purpose of updating if necessary. The latest copy examined by the review team was revised March 1, 1969.

2. The SEA review its policy on the withholding of allocations under $4,000, and inform this Office of rationale and problems attendant to a continuation of this practice; or inform this Office regarding plans for changing this practice, with a full discussion of rationale and problems.

3. The SEA in its expanded technical assistance activities as they relate to auditing, develop a profile of common categories of exceptions and use this in their overall program development activities with LEAs and for development of State policy as indicated.

SEA Policy Development and Parental Involvement

It is our understanding that the involvement of parents in SEA policy issues relative to Title I is limited to parental participation concerns. Even though we are clearly cognizant of the parameters of the Federal requirements regarding parental involvement at the local school district level, it would appear that New Jersey might take a step forward in providing a model for parental involvement for the locals. Such a step would entail a studied consideration of how the State-wide PAC, assuming that it is duly constituted and representative of the local system-wide parent advisory councils, might be more consistently involved in the Department's discussions leading to development of Title I priority and policy issues. In view of what was reported to be a fine working relationship with an unusually active and supportive state-wide PAC, the problems one might anticipate in such an arrangement could be minimized and the spin-off effect, supported by

appropriate and timely dissemination activities, would serve to motivate those local PACs which are experiencing certain growing pains. We are reminded of your recently published *SEA Guidelines for Approval of ESEA Title I Program Application* which are quite explicit on parental involvement requirements, but at the same time our observations in Perth Amboy and a recent visit from a group of Spanish speaking parents from Newark (communicated under separate cover on June 20, 1973) pointed to local problems in carrying out those requirements. We suggest that your own technical assistance efforts for improving parental involvement at the local level could be augmented by what happens at the SEA level and the kind of commitment demonstrated with the State-wide PAC.

The remaining areas of discussion in this letter, with the exception of the section on local site visits, will be undertaken with the acknowledgment that many of the areas of concern discussed at the exit conference in March have been addressed by the Title I staff since that meeting. Our concerns then included aspects of the following areas:

1. application review and approval process;
2. on-site visit and follow-up procedures;
3. staff development process at the LEA level;
4. SEA policy and instructions regarding Title I equipment inventory and disposition of equipment no longer maintained on inventory;
5. observations at the SEA level.

Application Review and Approval Procedure

Your recently published *Guidelines for Approval of ESEA Title I Program Application, Fiscal Year 1974* (subsequent to the March review) is one of the most complete and explicit documents of its kind that we have

seen. That, along with a similarly comprehensive application form and the application review "worksheets" (to be revised no doubt for Fiscal 1974 application) is responsive to the review team's concerns about adequate treatment of support services appropriate for Title I projects; the assessment of needs in determining program priorities; the process by which participants are to be selected; the requirement of measurable performance objectives for project components; the inclusion of the objectives of the previous year's activities in evaluating the project; and the use of the previous year's interim evaluation data for planning the next year's program. Your guidelines on non-public school involvement, preschool and kindergarten programs, and dissemination activities are likewise responsive.

Our recommendations in this area are that:

1. The SEA conduct task oriented workshops for LEA staffs and PAC groups on the new guidelines and application form. We recognize that a first step taken in this direction was the Cherry Hill conference held in May. There you familiarized a limited audience with program requirements and the application form. While we also recognize that Fiscal Year 1974 applications are due shortly, and that it is probable that some revisions will be made for next year (based on the 1973-74 school year experience), we view the two documents as durable and basic information which should be widely disseminated and understood by all who are involved in the Title I program. We anticipate that needs assessment, participant selection, non-public schools, and parental involvement might be some of the more difficult areas requiring special attention.

2. The application review "worksheet" be updated.

3. The evaluators continue their involvement in the review of new applications from the largest districts, and hold training sessions for Title I staff to deal with the increased emphasis on performance objectives, needs assessment and evaluation.

On-site Visit and Follow-up Procedures

The SEA has established a comprehensive on-site and follow-up procedure consisting of (1) applying a definite rationale (size of allocation, number of deficiencies noted on the application form, complaints) for determining which LEAs are visited on a priority basis, (2) giving special priority to all LEAs with allocations of $500,000 or more, (3) utilizing report forms for monitoring at the central office LEA level and at the local school level, (4) reporting on SEA visits to LEAs within two weeks of the visit with a request that LEA respond within 15 days. The annual monitoring schedule currently calls for 324 visitations. Helping teachers are responsible for visiting smaller LEAs annually; those LEAs under $50,000 probably will be monitored biennially.

The review team's reading of several SEA monitoring reports revealed thoroughness; and observations of the SEA team on-site in one LEA were positive.

Presently, evaluation personnel participate in monitoring visits to the 14 largest districts and a few others. There is no systematic method for choosing which others the evaluators will visit.

We recommend that the SEA should utilize its rationale sheet for determining priorities in working out a visitation schedule for the evaluators.

The SEA practice of sending expanded teams to the 14 largest school districts for three day monitoring visits insures thorough coverage of central office and project activities. While staff might have sufficient time for the identification of compliance problems and, in most instances, technical assistance activities, the SEA could assure itself of the optimum use of staff time during these

visits by developing a more detailed schedule which provides for identification of problems and the giving of technical assistance.

Staff Development at LEA Level

The new State guidelines are clear and strong on this point. As in all other aspects of program administration and implementation at the local level, the SEA should avail itself of frequent opportunities to participate in and/or observe staff development efforts at the local level.

Title I Equipment Inventory and Disposition

The Title I staff has developed a very instructive section in the new State guidelines on the subject of equipment inventory and disposition of equipment at the local level. At the same time, the SEA should be mindful of the fact that it is responsible for knowing the status of equipment and materials purchases both at the SEA and LEA level. We note that the application form does not require LEAs to report what is on hand. Such data would allow the Title I staff to make more valid decisions about additional requests for equipment and materials purchases.

Local Site Visits by OE Team

There are many factors which often contribute to the variance in program compliance and quality as projected by State guidelines and as effectuated at the local level. By the same token, it is often apparent that State leadership contributes to the implementation of good programs at the local level. In each of the four districts visited by the OE team certain positive features were observed. They include:

1. Elizabeth—efforts to implement a program management system;
2. Camden—the aide/paraprofessional/teacher career ladder concept;

3. Vineland—career ladder concept; program management system; summer school program limited to regular school year participants;
4. Perth Amboy—special institute for Spanish-speaking parents.

With the revised State guidelines and other improved SE Administrative practices already referred to at several points in this letter, we look forward to the resolution of several problem areas observed at local project sites.

Among those problem areas for which corrective action is required are:

1. Elizabeth—a) final resolution of the Instructional and Materials Center problem; b) selection of pre-Kindergarten participants on a "first come first serve basis", rather than those participants demonstrating the greatest need.
2. Camden—a) a realistic realignment of and/or reduction in the Title I administrative staff; b) inadequate needs assessment documentation as it relates to all program components and supportive services; c) confusion on the part of some staff (medical) regarding their roles and function; d) correlation between Winston Camp project and instructional activities; e) program design and scheduling resulting in a high frequency of movement by children back and forth to numerous staff during course of a given day. Some teachers have indicated that they do not have children long enough in order for the Galaxy process to be a meaningful reinforcement technique.

3. Vineland—a) vaguely written objectives not well tied into Project Puppies activities; b) Project Puppies aides and Title I aides at the Max Leuchter School not focusing on problems of the most severely disadvantaged children; speech therapist, nurse, attendance worker not focusing on Title I participants; c) Sacred Heart School (non-public) not involved in planning of mathematics and reading projects currently operating in that school. The principal was also uncertain as to the basis on which participants were selected.

4. Perth Amboy—a) informal, non-systematic approach to selecting of program participants (also a problem in Vineland); b) needs assessment founded on survey of teacher opinions and surveys of opinions of others knowledgeable about education problems in LEA. No objective data used since 1971; LEA staff feels that the 1971 test results have been corroborated by subsequent survey findings.

We would appreciate, within 60 days, a written response to this report with clarification on questions raised and comments on any action taken or planned for implementation of our recommendations.

The review team was encouraged by your action to date and look forward to a continuing relationship that will serve the best interests of the educationally deprived children in New Jersey.

Sincerely yours,

/s/ Richard L. Fairley
RICHARD L. FAIRLEY
Director, Division of
Compensatory Education

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket No.

Civil Action 80-1991

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, PETITIONER

v.

SHIRLEY HUFSTEDLER, SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION, RESPONDENT

PETITION FOR REVIEW

The State of New Jersey, Department of Education, hereby petitions the Court for review of the final decision of the Secretary of Education dated May 7, 1980, in the Appeal of the State of New Jersey, Docket No. 14-(29-76, Audit Control No. 50006-02, ordering the State of New Jersey to refund to the Secretary of Education the amount of $1,031,304.00.

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Petitioner

By /s/ M. Kathleen Duncan
M. KATHLEEN DUNCAN
Deputy Attorney General

Dated: July 3, 1980

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY
Washington, D.C. 20201

March 31, 1978

Office of the
General Counsel

Dr. David S. Pollen, Chairman
Title I Audit Hearing Board
U.S. Office of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Title I Audit Appeal of New Jersey
Docket No. 14-(29)-76
Audit Control No. 50006-02

Dear Dr. Pollen:

Enclosed is a joint "Pre-hearing Memorandum", together with the SEA's statement of factual and legal contentions and the Deputy Commissioner's statement of the issues presented and his position.

This letter clarifies that neither party requests a formal evidentiary hearing, at this time. We believe that all evidence on factual issues can be presented through briefs, documentary evidence and affidavits. However, both parties reserve the right to cross-examine affiants if their statements raise contested issues of fact.

This letter further clarifies that the parties jointly propose the following schedule:

(1) Within 45 days after the Panel issues its order regarding further proceedings the SEA shall file its brief together with all supporting documentary evidence and affidavits.

(2) Within 45 days after receipt of the SEA's brief the Deputy Commissioner shall file its brief together with all supporting documentary evidence and affidavits.

(3) Within 20 days after receipt of the Deputy Commissioner's brief the SEA may file a reply brief.

The New Jersey SEA requests (and we do not oppose this request) that the Panel schedule oral argument at a convenient time following the exchange of briefs.

Mr. Mark Schorr, counsel for the SEA has been informed of and concurs with the clarifications in this letter.

Sincerely,

/s/ Robert J. Arnot
ROBERT J. ARNOT

/s/ Philip H. Rosenfelt
PHILIP H. ROSENFELT
Attorneys for the Deputy Commissioner
for the Bureau of Elementary and
Secondary Education

cc: Mr. Mark Schorr, Esq.

BEFORE TITLE I AUDIT HEARING BOARD
U.S. OFFICE OF EDUCATION
DEPARTMENT OF HEALTH, EDUCATION
& WELFARE

Docket No. 14-(29)-76

APPEAL OF STATE OF NEW JERSEY
TITLE I, ESEA

PRE-HEARING MEMORANDUM

1. HEARING:

Neither party at this time requests a formal evidentiary hearing. In the event that no factual issues arise, the hearing in this matter will be confined to oral argument on the admissibility of documents and the legal issues raised.

In place of a formal evidentiary hearing, SEA will submit an affidavit from one of those who participated in the recalculations which it asserts now show eligibility of the schools declared ineligible by the audit. Counsel for the Deputy Commissioner will be provided with a copy of the affidavit in advance of the date set for argument and reserves the right to cross-examine the affiant if his statement raises contested issues of fact.

The Deputy Commissioner reserves the right to submit an affidavit of an auditor involved in this matter. Counsel for SEA will be provided with a copy of the affidavit in advance of the date set for hearing and reserves the right to cross-examine the affiant if his statement raises contested issues of fact.

2. EXHIBITS:

All other evidence to be offered at the hearing will be documentary in form. The respective parties will confer prior to hearing in order to mark in evidence by consent as many exhibits as possible. Exhibits offered by each party will be appended to its brief.

3. BRIEFS:

SEA's brief will be filed 45 days after the Panel issues its order regarding the hearing in this matter. The Deputy Commissioner's brief will be filed 45 days after receipt of SEA's brief. A reply brief, if one is deemed necessary, will be filed by SEA 20 days after receipt of the Deputy Commissioner's brief. All briefs will be served by certified mail, return receipt requested.

4. OTHER MATTERS AGREED UPON:

The parties have reached a tentative settlement regarding OE's claims for school year 1970-71. When a firm agreement is reached, a stipulation of settlement will be provided to the Panel for its approval.

5. FACTUAL AND LEGAL CONTENTIONS OF THE PARTIES:

See attached memoranda.

/s/ Robert J. ARNOT
Attorney for the
Deputy Commssioner

/s/ Philip H. Rosenfelt
Attorney for the
Deputy Commissioner *
JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for New Jersey Department of Education

By: /s/ Mark Schorr
MARK SCHORR
Deputy Attorney General

* See our attached letter of March 31, 1978 for clarification.

Statement of the Issues Presented and the Deputy Commissioner's Position

1. Whether $91,266 in Title I funds were improperly expended at the Lafayette Street School (which was shown on the Newark LEA's 1970-71 Title I project application as having a low-income percentage below the district-wide average) during the 1970-71 project year?

It is the Deputy Commissioner's position that the Lafayette Street School was, as shown in Newark's 1970-71 project application, an ineligible attendance area and that $91,266 in Title I funds were improperly expended at the Lafayette Street School during the 1970-71 project year. The amount of funds which are recoverable has been substantially reduced by the statute of limitations and the parties have reached a tentative settlement of the Lafayette Street School audit determination.

2. Whether $41,021 in Title I funds were improperly expended at ten Newark schools (which were not listed on the Newark LEAs 1970-71 Title I project application as having low-income percentages below the district-wide average) during the 1970-71 project year?

It is the Deputy Commissioner's position that $41,021 in Title I funds were improperly expended at ten Newark schools during the 1970-71 project year. These ten schools were not listed on the Newark LEA's 1970-71 Title I project application as having low-income percentages below the district-wide average. The amount of funds that are recoverable has been substantially reduced by the statute of limitations and the parties have reached a tentative settlement of the audit determination concerning these ten Newark schools for 1970-71.

3. Whether the Newark LEA's method of computing the low-income percentages, listed in Newark's 1971-72 Title I project application, for school attendance areas complied with the Title I statute and regulations?

It is the Deputy Commissioner's position that Newark's method of computing the low-income percentages clearly violated Title I requirements, in particular the method set forth in 45 CFR 116.17(d) for determining the eligibility of attendance areas. The method used by Newark had basic mathematical flaws which inflated the low-income percentages for individual school attendance areas and thus improperly increased the number of eligible attendance areas.

4. Whether $1,029,630 in Title I funds were improperly expended during the 1971-72 project year at 13 Newark schools which the Newark LEA had incorrectly classified as eligible to receive Title I funds?

It is the position of the Deputy Commissioner that $1,029,630 in Title I funds were improperly expended at 13 ineligible schools during the 1971-72 project year.

5. Whether the recalculation of low-income percentages contained in Mr. Joseph Moore's May 7, 1976 letter to Dr. Richard Fairley (or any other after-the-fact eligibility recalculation) is relevant to this appeal?

It is the Deputy Commissioner's position that the New Jersey SEA, in approving the Newark LEA's 1971-72 Title I project application, violated its assurance to the U.S. Commissioner of Education that it would approve only applications which were in compliance with the Title I statute and regulations. The Newark LEA's 1971-72 application contained computations of eligibility that violated basic Title I requirements. Subsequent eligibility recalculations are not relevant.

6. Assuming *arguendo* that the May 7, 1976 recalculation (or any other after-the-fact eligibilty recalculation) is relevant, does such recalculation comply with the Title I statute and regulation?

As stated in the Deputy Commissioner's June 11, 1976 Final Determination Letter, the May 7, 1976 recalcula-

tion violates Title I requirements and (like the method used in computing the percentages in the 1971-72 project application) improperly inflates the low-income percentages for individual school attendance areas and thus improperly increases the number of eligible attendance areas.

/s/ Philip H. Rosenfelt
PHILIP H. ROSENFELT

/s/ Robert J. Arnot
ROBERT J. ARNOT

Attorneys for the Deputy Commissioner
for the Bureau of Elementary and
Secondary Education

March 31, 1978

SEA'S FACTUAL AND LEGAL CONTENTIONS

1. HEW is without authority to recover Title I monies already expended at the local level. Its sole remedy is prospective and is prescribed by statute witholding of future funds.

2. For the years in question in the instant action, the Newark program in general met the requirements of Title I. In approving the district's applications, SEA properly considered AFDC data and further recognized indices of poverty. The failure of the auditors and the Deputy Commissioner to recognize such reliance militates toward the conclusion that their findings were unjustified.

3. The propriety of SEA's action was also demonstrated, if not by the Newark application, then by recalculations done subsequent to the audit. They showed that the expenditure in schools alleged to be ineligible were in fact proper and in conformance with the applicable Title I regulations. If such recalculations are not considered, the result would be unduly punitive, and those penalized would be precisely the individuals Title I of the Elementary and Secondary Education Act was designed to benefit—disadvantaged children.

4. In the alternative, under any view of the applicable regulations, the whole of the school district could have been considered a Title I project area.

BEFORE TITLE I AUDIT HEARING BOARD
U.S. OFFICE OF EDUCATION
DEPARTMENT OF HEALTH, EDUCATION
& WELFARE

Docket No. 14-(29)-76

APPEAL OF STATE OF NEW JERSEY
TITLE I, ESEA

AFFIDAVIT OF BERNARD J. BRANDWENE

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for New Jersey Department
of Education
State House Annex
Trenton, New Jersey 08625

MARK SCHORR
Deputy Attorney General
Of Counsel and
On the Brief

STATE OF NEW JERSEY)
) ss.
COUNTY OF MERCER)

I, BERNARD J. BRANDWENE, of full age, being duly sworn according to law, upon my oath depose and say:

1. I am currently in the employ of the New Jersey Department of Education. My title is Accountant I. Among my current responsibilities is fiscal program management of ESEA Title I to sub-grantees.

2. I am submitting this affidavit in connection with the appeal of the State of New Jersey, Department of Education, the above-captioned matter.

3. In November 1975, a meeting was held in the office of Mr. Frank Esposito, Federal Programs Director for Newark. I was among those who attended. The others were Frank Esposito, Rudy Jacob, Bob Darden, Sanford Gottlieb and Mel Marech, all of whom were employed in the Newark Federal Programs Office. Also in attendance were Jerome Jones, Ira Helfgott, Bill Franssen, and John Calcerano, all of whom were, as was I, in the employ of the New Jersey State Department of Education.

4. The aforementioned meeting was held to review the material and data involved in an audit exception of $1,029,630 contained in the Report of Audit of Title I of the Elementary and Secondary Education Act of 1965, Audit Control No. 50006-02, which related to the selection of target areas for Newark, New Jersey for the period September 1, 1970 to August 31, 1973. Discussion was limited to Recommendation No. 1 on page 18 of the Report, which was to the effect that $1,167,917 should be returned to the United States Office of Education. It was alleged in the report that that sum was expanded on ineligible attendance areas for school years 1970-71 and 1971-72.

5. As a result of these discussions it was agreed that the source data utilized for total low-income children for

individual attendance areas were incomplete and did not reflect accurately the number of low-income children concentrated in the areas.

6. Although school attendance areas were defined, we determined that the Newark Board of Education's long-standing policy of open enrollment (which meant that some children in a particular area might be attending other schools throughout the city) indicated that a different method of calculating eligibility should have been used. In our estimation, the proper method was one described in Title I ESEA Program Guide #44, furnished to us by the Office of Education, Department of Health, Education and Welfare. Criterion 1.1 of that document, we believed, authorized us to use a system of ranking, and a ratio which considered all school children who resided in a particular attendance area and were enrolled in elementary, junior and senior high schools. A true copy of the relevant excerpts from Program Guide #44 are attached hereto as Exhibit A.

7. AFDC data were utilized in the ratio. The numerator was comprised of the total number of AFDC children from any attendance area enrolled in elementary, junior and senior high schools; the denominator was made up of the total number of children from the area enrolled in elementary, junior and senior high schools. The formula was set up as follows:

$$\frac{\text{"Total number AFDC children in elementary, junior and senior high schools}}{\text{Total students enrolled in elementary, junior and senior high schools."}} = \text{Ratio}$$

8. The actual calculations are shown in Exhibit B, attached hereto. Columns 1, 2, 3 and 5 of Exhibit B are the same figures relied upon by the auditors on page 12 of their aforementioned report. Column 6 is the formula used to determine the number of students from a particular school enrolled in junior and senior high schools. The product of the two numbers in column 6 yielded the

number of students from a particular attendance area in junior and senior high schools. To make an example, according to Newark's statistics, 34.1 percent of the total junior and senior high school populations of schools fed by the Madison School (2389) come from the Madison school's attendance area. The product of those two figures thus demonstrates the number of students from the Madison attendance area enrolled in junior and senior high schools, or 815 (column 7). Adding that total to the total elementary enrollment column's yielded the number of students of all elementary and secondary grades from the Madison attendance area. The number represents the numerator in the above formula.

9. I have also provided data which demonstrates the extraordinary effort exerted by the taxpayers of Newark on account of Newark's meager tax base. Newark is at present, as it was in school year 1971-72, among the most overburdened municipalities in New Jersey. These data are attached hereto as Exhibit C.

/s/ Bernard J. Brandwene
BERNARD J. BRANDWENE

Sworn and subscribed to
before me this 30th day
of May, 1978.

EXHIBIT S-V

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT
NEWARK, NEW JERSEY

FEDERAL ASSISTANCE PROGRAMS
P.L. 89-10 ELEMENTARY AND
SECONDARY EDUCATION ACT OF 1965

TITLE I
APPLICATION FOR
FISCAL YEAR 1971-1972

FRANKLYN TITUS
SUPERINTENDENT OF SCHOOLS

SELECTION OF ATTENDANCE AREAS FOR TITLE I PROJECTS

The attendance areas selected for Title I projects are those areas which, on the basis of the best available information have high concentrations of children from low-income families.

Eligible schools have been listed in order of highest concentration. The criterion used in qualifying schools was based on statistics on Aid for Dependent Children supplied by the Essex County Welfare Board.

Before selecting this method for qualifying attendance areas and schools within those attendance areas the following data were also examined:

- Housing statistics supplied by Applied Urbanetics
- Model Cities Statistics (Entire City of Newark is now a Model Neighborhood)
- Free lunch and free breakfast statistics (32,865 served daily)
- High percentage of Puerto Rican children
- High incident of foreign born and non-English speaking children
- Health Statistics
- Unemployment and Underemployed statistics

It should be noted that in comparing the statistics and projections compiled by Applied Urbanetics and the A.D.C. statistics provided by the Essex County Welfare Board, that each complements (possibly validates) the other.

	Applied Urbanetics	ADC Statistics
Children from low-income families 5-17	33,011	32,352
District Wide Percentage	32.6%	33.9%

The district-wide percentage was determined to be 33.9% of children 5-17 from low-income families. Located in eligible attendance areas are forty-two (42) public elementary schools, fourteen (14) non-public elementary schools, five (5) public junior high schools, six (6) public senior high schools and twelve (12) special education schools. Cleveland Elementary school will not participate in the E.S.E.A. Title I Program because it is endowed by the Chubb Foundation and the project is known as the "Victoria Plan". West Kinney Junior High school will not participate in the E.S.E.A. Title I Program because it receives supplementary funds from the Newark Board of Education and is known as the "Newark Plan".

Thirteenth Avenue school is a new school which will open in September, 1971 and draw its pupils from the Fourteenth Avenue, Fifteenth Avenue, Newton Street and South 8th Street School attendance areas. The percentage of children from low-income families is the average of the percentages of the four eligible attendance areas.

Based on an initial allocation of $7,202,529, it was determined that 23,900 children would participate in the program and receive at least $300 in Title I services and resources as mandated by state guidelines.

The average percentage of 35.7% was applied to the enrollment of each of the eligible public elementary, non-public elementary and special education schools in order to allocate on an equitable basis the number of Title I participating children in each of these schools.

The selected eligible secondary schools show the average percentage of low-income of all of the eligible elementary schools which feed into each of the secondary schools. The selected eligible secondary schools were assigned participating children on the basis of those children previously identified and who received Title I services in these schools in FY 1969, FY 1970, and follow-up services for new entrants who had been identified as Title I participants in the feeding public elementary, non-public elementary and special education schools in FY 1970-1971.

Special Education schools are classified by handicap and therefore draw children from all attendance areas in the city. Participating children were allocated at the same percentage as other schools—35.7% of the enrollment.

Finally, the 23,900 participating children were distributed in the selected schools in eligible attendance areas as follows:

41 Public Elementary	16,639
6 Public Senior High	3,433
4 Public Junior High	1,407
14 Non-public Elementary	1,572
12 Public Special Education	849
TOTAL	23,900

14. List objective data in priority order that was used to validate the identified needs of the educationally deprived children in eligible attendance areas (include both public and non-public school children who reside in the area).

A. THE BASIS

In attempting to determine the basis for priorities, each Title I school developed an on-going process of total involvement. Operating under the leadership of the Project Coordinator and with the approval of the principal, each Local Parent Council, project remedial/developmental teachers, student representatives at the secondary level, and a cross section of the school community defined pupil needs and established priority levels.

Based on the data and information gathered by this assessment group priorities were developed. The emphasis was placed on obtaining optimum academic achievement by each of the participating pupils. This needs assessment procedure carried on in each of the participating schools was directed towards a maximum

involvement of parents of the students for whom the Title I resources are intended.

There has been continuous liaison between the Administrator of the Title I Program and the Office of the Superintendent of Schools, of the Archdiocese of Newark. The Assistant Superintendent of Schools of the Archdiocese is a permanent member of the Central Parent Council.

The same criteria and the same involvement of staff and parents were used in assessing the educational needs of children in the non-public schools as were used in the public schools. Therefore, the needs assessment conducted for the elementary public schools applies to the non-public elementary schools.

Prior to any final decision on priorities, the local schools examined the results of the city-wide testing program administered in October, 1970. Newark's Director of Reference and Research released the following information:

"City-wide test results indicate that most Newark pupils are below the national norm in reading and in arithmetic. An examination of school medians and score ranges at the third, sixth, and seventh grade levels indicates that below-norm scores are generally distributed and are not necessarily confined to any one area of the city.

GRADE 3 ANALYSIS OF TEST RESULTS

Approximately 6,100 pupils were tested in Grade 3. Results of the *Reading Comprehension* (*Sentence and Paragraph*) section of the Metropolitan Reading Test show:

In Grade 3, out of every 100 pupils

18 were at, or above the norm in Reading

82 were below norm.

Of the 82 below norm,

32 were less than 1 year below.

50 were 1 year or more below.

In the 51 elementary schools tests, the Reading Comprehension medians (middle score) indicated

2 schools were at, or above norm.

32 schools were less than 1 year below the norm.

17 schools were 1 year or more below the norm.

The age medians on a city-wide basis were:

7 years 10 months—Mental Age

89—Median IQ

In the 44 elementary schools tested in Grade 6, the Reading Comprehension medians (middle score) indicated

No schools had a median at or above the norm.

2 schools had a median less than 1 year below norm.

42 schools had a median 1 year or more below the norm.

An analysis on a city-wide basis of Chronological Age and Kuhlman-Anderson test results shows for Grade 6

11 years 7 months—Median Chronological Age

10 years 4 months—Median Mental Age

89—Median IQ

GRADE 6 ANALYSIS OF TEST RESULTS

Approximately 5,400 pupils were tested in Grade 6. Results on the *Reading Comprehension* (*Paragraph*

Meaning) section of the Metropolitan Reading Test show:

In Grade 6, of every 100 pupils

8 were at, or above norm.

92 were below the norm

of the 92 below norm,

10 were less than 1 year below.

82 were 1 year or more below.

In 44 elementary schools tested in Grade 6, the Reading Comprehension medians (middle score) indicated

No schools had a median at or above the norm.

2 schools had a median less than 1 year below the norm.

42 schools had a median 1 year or more below the norm.

11 years 7 months—Median Chronological Age

10 years 4 months—Median Mental Age

89—Median IQ

The educational criteria for eligibility for participation in Newark's Title I project are as follows:

a) Poor academic achievement

b) Lack of response to conventional classrom approaches

c) Inadequate performance in communicative skills

d) Socially unacceptable behavior

e) Indifference to responsibility

f) Deficiency in cultural background

g) Physical defects and poor health habits

h) Poor school attendance

The instruments used for determining eligibility for participation were as follows:

a) Test scores (city-wide testing program)

b) Title I standardized reading achievement tests

c) School surveys

d) Guidance records

e) School cumulative record cards

f) Title I cumulative record cards

g) Reading profiles

h) Reading inventories

i) Anecdotal records

j) Health records

k) Dental survey

The existing data on the extent and nature of the health, nutrition and learning problems of the children in the attendance area indicates the following:

In the entire country Newark is second only to Washington, D.C. in the percentage of black population (54.2%). Another 11% of the population is comprised of people from an Hispanic background. Over 11% of the labor force are presently unemployed. 35,000 people are employed either full time or part time at a rate of $3,000 per annum.

Over 30% of Newark's population is receiving some form of public assistance.

Almost 80% of the dwelling units in Newark are at least 40 years old. 30% of the city's housing supply, or about 41,000 units, are clearly substantard.

Newark leads nationally with the highest percentage of slum housing, the highest incidence of crime per 100,000 population, the highest population turnover, the second highest population density, a high rate of maternal mortality, the second highest birth rate, a high rate of veneral disease and the seventh highest confirmed number of narcotic addicts. At present the city faces imminent bankruptcy.

All of these factors contribute to a deleterious effect on the nature of the health, nutrition and learning problems of school children. The already overburdened school system, municipal and state agencies supplying only the most fragmented health services, are overwhelmed with the problem of providing the necessary quantity and quality of services to ameliorate the situation.

Supreme Court of the United States

No. 83-2064

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

NEW JERSEY

ORDER ALLOWING CERTIRORARI. Filed *October 1, 1984.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Third Circuit* is granted.

NO. 83-2064

Office - Supreme Court, U.S.
FILED
DEC 24 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

T.H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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Counter-Statement of Question Presented

Whether the 1978 Amendments to the Elementary and Secondary Education Act, which clarified the standards for Title I eligibility and corrected an administrative regulation which denied disadvantaged children Title I programs simply because they lived within an extremely poor school district, should be applied to the Newark Title I program where, even pursuant to the overly restrictive eligibility recalculations of the federal auditors, ten attendance areas had concentrations of poverty ranging from 33.5% to 27.9%; whether the Secretary's demand that New Jersey repay Title I moneys used to provide appropriate supplemental reading, mathematics and bilingual programs to disadvantaged children found to be in need of those specialized educational programs was reasonable when those programs were provided in attendance areas having concentrations of poverty ranging from 33.9% to 27.9% and where the Secretary's own regulation was amended in 1976 to recognize attendance areas with concentrations of poverty in excess of 30% as eligible for Title I funding and where Congress, dissatisfied with the Secretary's restrictive implementation of Title I, through the 1978 Amendments to the ESEA, recognized attendance areas with concentrations of poverty in excess of 25% as eligible for Title I funds.

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ARGUMENT:

The decision of the Third Circuit, wherein the 25% eligibility standard of the 1978 Amendments to the ESEA was used to measure the eligibility of Newark's attendance areas should be affirmed by this Court since it faithfully advances the overriding congressional objectives in enacting and continually strengthening the Title I legislation and since it represents a just and fair resolution of the dispute between the Secretary and the State of New Jersey 21

A. From the inception of the Title I program, the congressional objective has been to provide financial asistance to areas with high concentrations of poverty so that disadvantaged children will receive remedial programs designed to meet their unique educational needs; most assuredly, it has never been the intent of Congress to deprive eligible children of much needed educational programs simply because they live in school districts with extraordinarily high levels of poverty 27

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B. The Title I eligibility regulation, inflexibly enforced by the Department of Education to deny needed Title I programs to disadvantaged children living in attendance areas in Newark with concentrations of poverty ranging from 33.5% to 27.9%, is a rule out of harmony with the clearly articulated goals of the Title I program 34

C. The Third Circuit correctly measured the eligibility of Newark's attendance areas by the 25% eligibility standard enacted as part of the 1978 Amendments to the ESEA and not by the Title I regulation which, contrary to the objectives of the Title I program, ignored the unique problems of extremely poor school districts 41

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NO. 83-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

T.H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT

Counter-Statement of the Case

Before this Court for a second time is a supplemental program of compensatory education provided by the Newark Board of Education during the 1970-71 and 1971-72 school years. This particular program, funded by Title I of the Elementary and Secondary Education Act, endeavored to meet the unique educational needs of those disadvantaged children living in the Newark school district, a district which is recognized as one of the most impoverished in the United States. However, unlike *Bell* v. *New Jersey*, —— U.S. ——, 103 S.Ct. 2187, 2199, 76 L.Ed.2d 312, 329 (1983) which only concerned "the abstract question whether the Secretary [of Education] has the right to recover Title I funds under any circumstances. . . ." the present case provides this Court with the opportunity to review, for the first time, the Title I program as it was implemented by the City of Newark during the early years of a federal program which was aptly characterized by the Court below as "one of the most ambitious federal forays into the educational domain." *State of New Jersey, Dept. of Educ.* v. *Hufstedler*, 662 F.2d 208, 210 (3d Cir. 1981).

While federal courts have had occasion to consider the appropriateness of the educational programs provided with Title I funds or the eligibility of students to participate in those programs or whether the supplanting prohibition or the comparability requirement of Title I have been violated by local school districts, none of those issues are involved in the present case. The Secretary does not question the eligibility of the poor and disadvantaged children who participated in, and benefitted from, the Newark Title I program during the 1971-72 school year. Neither does the Secretary challenge the scope, size or quality of the supplemental reading, mathematics and bilingual educational programs provided those eligible children. Furthermore, the record contains not even a remote suggestion that the federal Title I moneys had been used to supplant, rather than supplement, the State and local educational

effort. Finally, as is readily conceded by the Secretary, Newark received its correct allocation of Title I moneys during the period covered by the audit. What is before this Court is the more difficult and narrower issue of whether Newark properly identified as "target populations" for the receipt of Title I moneys in the 1971-72 school year, attendance areas which, according to the federal auditors' conservative recalculations, had levels of poverty ranging from 33.5% to 27.9% or whether, in accordance with the Secretary's inflexible application of the targeting requirement, eligible children within those attendance areas should have been deprived of the educational benefits of Title I programs.

Commenting on the bill which was to become the Elementary and Secondary Education Act of 1965, President Johnson said: "This bill has a simple purpose: To improve the education of young Americans." S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1448. In reporting the original legislation to the House in 1965, the House Committee on Education and Labor stated:

> The purpose of this legislation is to meet a national problem. This national problem is reflected in draft rejection rates because of basic educational deficiencies. It is evidenced by the employment and manpower retraining problems aggravated by the fact that there are over 8 million adults who have completed less than 5 years of school. It is seen in the 20-percent unemployment rate of our 18-24-year-olds. It is voiced by our institutions of higher learning and our vocational and technical educators who have the task of building on elementary and secondary education foundations which are of varying quality and adequacy.

The Title I program was, therefore, intended to break the link between poverty and underachievement by distributing substantial federal aid to school districts experiencing difficulties in funding adequate educational programs due to "concentrations of low-income families." 20 U.S.C. §241a; H. Rep. No. 93-805, 93rd Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4095. In its report on the 1966 Amendments to Title I, the House Committee stated:

> ". . . when 30 to 40 percent of the children in the district are from low-income families, all of the children in the district could be considered disadvantaged and the whole system could be upgraded. We emphasize that these funds are . . . to be used as supplementary upgrading funds and are not to replace State or local funds. State and local effort is to be maintained." H. Rep. No. 1814, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3846.

The Newark school district for the years 1970 through 1973, the period covered by the federal audit before this Court, could readily be characterized as the prototypic Title I district. The application for Title I funds for the 1971-72 school year, the primary focus of the audit, showed that 33.9% of the children in the Newark school district were from low-income families (J.A. 108). The narrative portion of this application clearly demonstrated that Newark was uniformly disadvantaged in other ways. Statistics showed a jobless rate in 1970 of 14%; a rate which was double that needed to qualify under the Economic Development Act. Another 35,000 Newark residents were earning $3,000 per year or less.[1] In 1971, the Model Cities pro-

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[1] An element of unfortunate constancy in this case is the level of poverty in the City of Newark. Indeed, of American cities with populations in excess of 100,000, Newark had a poverty rate in 1979 of 32.8%—the highest in the country. 1980 Census of Population and Housing, *Summary Characteristics for Governmental Units and Standard Metropolitan Statistical Areas*, Series PH C80-3.

gram in Newark was expanded to include the entire city. At the time the 1971-72 application was submitted, Newark had a black population of 54.2% with another 11% of its population of hispanic background. The City also had the highest percentage of slum housing in the nation, the highest incidence of crime per 10,000 population, the highest population density, a high rate of maternal mortality and the second highest birth rate. Of particular significance to the Title I program, and exacerbating the inherent difficulties of obtaining precise statistics for Newark's low-income population, was the fact that in 1970-71 Newark had the highest population turnover in the nation. Indeed, Model Cities data indicated that mobility rates reached as high as 80% for schools in the Title I area (J.A. 113 to J.A. 114; J.A. 69).

Presenting dramatic evidence of the strong correlation between desperate economic conditions and educational underachievement was the section of the Newark Title I application which reported the results of reading tests administered to its third and sixth grade pupils. Of 6,100 pupils tested in Grade 3, 82 out of every 100 pupils were below norm. Only two schools of the 51 elementary schools were at or above the national norm. The testing results were even more distressing for Newark's sixth grade students. In this grade approximately 5,400 pupils were tested on the Reading Comprehension section of the Metropolitan reading test. Of these, 92 out of every 100 children were below the national norms and of the 44 elementary schools tested, none had a medium at or above the norm. Reported data also showed that the majority of children in all of the project areas suffered from at least one of the following educational handicaps

1) insufficient knowlege of English

2) poor speech patterns

3) lack of ability to communicate verbally with others

4) low levels of aspiration and self esteem

5) health, home and cultural handicaps

(J.A. 110 to J.A. 113).

In 1974 the Department of Health, Education and Welfare Audit Agency (hereafter HEWAA) conducted an audit of the Newark Title I program for the period from September 1, 1970 to August 31, 1973. Of the $28,709,198 in Title I funds sub-allotted to Newark during that period, $9,899,446 was received for the 1971-1972 school year. The eligibility of the educationally disadvantaged children who participated in Title I programs during this period was not at issue nor was there any question that Newark provided supplemental programs of compensatory education of sufficient size, scope and quality to meet the unique educational needs of its children.[2] Rather, the federal auditors focused on whether Newark had properly determined its eligible attendance areas; whether it had correctly identified its "target populations." This targeting requirement is a preliminary step in the Title I process whereby target populations of children are identified; these target populations are then considered for participation in Title I

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[2] *Amicus*, Lawyers' Committee for Civil Rights under Law, concedes that the federal auditors did not question the "size, scope and quality" of the compensatory education programs provided by Newark during the audit period. *Amicus* brief at 6, n. 15. However, *Amicus* suggests for the first time before this Court that perhaps Newark's programs failed to meet those requirements. Such speculation finds absolutely no support in the record below. Indeed, quite to the contrary, the record demonstrates that at a time when school districts nationally were spending an average of $175 from Title I funds for each Title I student, the Newark program provided $300 from its Title I funds for each student participating in the federal program (J.A. 108); H. Rep. No. 93-805, 93d Cong., 2d Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4096. Clearly these per pupil expenditures in 1971 were more than sufficient to assure the provision of meaningful programs of compensatory education to Newark's disadvantaged children.

activities on the basis of educational deficiency and the need for special services. *ESEA Title I Program Guide #44* (March 18, 1968) (PNJa223).[3]

At the time of the Newark audit, the statutory eligibility standard simply provided that Title I funds should be used for projects designed to meet the special educational needs of educationally deprived children in "school attendance areas having high concentrations of children from low-income families," 20 U.S.C. §241e(a)(1). This eligibility standard was interpreted by Title I regulations as including attendance areas in which the estimated number or estimated percentage of children from low-income families was as large as, or larger than, the estimated average number or percentage of such children in the school district. 45 C.F.R. §116.17(d)(2) (1972) (PNJa217 to PNJa220). This regulation also specifically provided:

> In certain cases, the whole of a school district may be regarded as an area having a high concentration of such children [from low-income families] and be approved as a project area, but only if there is no wide variance in the concentrations of such children among its several attendance areas in the school district.

The regulations also defined an "attendance area" as meaning "in relation to a particular school, the geographical area in which the children who are normally served by that school reside." 45 C.F.R. §116.1(b). Thereafter, the regulations define "project area" as the "attendance area, or combination of attendance areas, having a high concentration of children from low-income families which, without regard to the location of the project itself, is designated as the area whose children are to be served by the project." 45 C.F.R. §116.1(v).

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[3] PNJa—— refers to the Appendix filed on behalf of the State of New Jersey, Department of Education, in the Court of Appeals for the Third Circuit.

The Newark Title I application for 1971-72 showed that 33.9% of the children in the Newark school district were from low-income families. Its application further showed 54 elementary schools with low-income percentages ranging from 84.7% to 10%. Following 45 C.F.R. §116.17(d), Newark designated the 42 elementary schools having low-income percentages in excess of 33.9%, the district-wide average, as eligible attendance areas for Title I programs. Newark also listed 8 high schools having low-income percentages ranging from 59% to 16.5% and 5 junior high schools with percentages from 69.5% to 41.6%. Of these, Newark designated 6 high schools and 4 junior high schools with low-income percentages in excess of 33.9% as eligible for Title I programs (PNJa366 to PNJa367).

The HEWAA auditors reviewed the methodology employed by Newark to select its attendance areas. At the outset, they found that Newark, after considering various data sources, determined to rely on Aid for Dependent Children (ADC) statistics supplied to it by the Essex County Welfare Board to calculate its attendance area eligibility.[4] However, in reviewing the statistics provided by the Welfare Board, the auditors found them to be incomplete, listing only ADC children enrolled at each public school and excluding "those children on ADC rolls attending private and special education schools [established for children with special handicaps] or who had dropped out of school" (J.A. 20). Since complete ADC statistics were not available to Newark for the 1971-72 school year, Newark was unable to determine the number of ADC children residing within the various attendance areas and eligible to attend the public schools. The gap in the ADC statistics forced Newark to use the number of ADC children *actually* attending the public school, rather than those *eligible* to attend the public schools, to calculate attendance

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[4] ADC statistics were recognized as an acceptable data source for determining the number of children from low-income families. *ESEA Title I Program Guide #44* (March 18, 1968) (PNJa223).

area eligibility. The HEWAA auditors recognized that this methodology was a "reasonable alternative" under Newark's unique circumstances although they pointed out that it would tend to underestimate the number of ADC children in each attendance area (J.A.20 to J.A.21).[5]

Analyzing Newark's application of this acceptable methodology, the HEWAA auditors concluded that Newark had correctly calculated its district-wide low-income percentage of 33.9% for the 1971-72 school year (J.A.20). However, the auditors found that in determining attendance area eligibility, Newark had erroneously compared (1) the number of ADC children residing in each attendance area and actually attending *public schools* with (2) the total

[5] Since the early years of the Title I program, sophisticated systems have been developed to more accurately capture and report statistical information on children from low-income families. An indication of the higher degree of accuracy, as well as the increasingly impoverished state of the city, is the Chapter 1 application for the Newark school district for the 1984-85 school year which shows a district-wide level of poverty of 58.63%. While the incidence of poverty in Newark may well have increased from 33.9% in 1971-72 to 58.63% in 1984-85, it may also be that the incomplete statistics available in the earlier year artificially deflated Newark's district-wide level of poverty. Also of particular interest to the present case are the current levels of poverty in the various attendance areas declared ineligible for Title I funds in 1971-72. The 1984-85 application shows the following:

School	1984-85 Low-income percentage
Madison	78.29%
Newton Street	70.56%
So. 17th Street	73.91%
Central Avenue	Closed
Burnet Street	74.62%
Waverly Avenue	Closed
Franklin	78.43%
Garfield	75.57%
Hawkins	49.46%
Clinton Jr. High	Closed
Marcus Garvey	41.65%

number of children residing within each area and attending the *public elementary schools*. The auditors found that the "results were unacceptable since there was no direct relationship between the component elements" (J.A.21). They replaced the Newark formula with one which eliminated the ADC children attending secondary schools from the comparison. By applying their revised formula, the auditors reported that the following schools were ineligible for receipt of Title I funds during the 1971-72 school year:

Low-Income Percentage

School Attendance Area	Shown by Newark on Application	As Computed by Auditors	Title I Expenditures Disallowed by Auditors
Madison	60.6%	28.8%	$ 130,750
Newton Street	54.9	31.5	69,463
So. 17th Street	53.1	33.5	104,842
Central Avenue	53.0	29.4	61,532
Burnet Street	50.6	30.2	56,007
Waverly Avenue	49.9	31.9	56,665
Franklin	46.5	32.4	115,227
Marcus Garvey	46.2	22.9	119,487
Garfield	34.7	20.6	81,976
Hawkins	34.7	30.3	102,803
Clinton Jr. High	69.5	32.1	58,214
Weequahic High	37.5	27.9	53,284
East Side High	35.0	13.0	46,380
			$1,029,630

(J.A.23, J.A. 24, J.A.25).[6] The auditors found, however, that Newark's problems in calculating the eligibility of its attendance areas "did not recur and the City's eligibility determinations for school year 1972-73 were properly

[6] The HEWAA auditors also found that $132,284 in Title I moneys had been expended during 1970-71 in Newark schools which the auditors alleged were not eligible for receipt of such funds. This disallowance is not involved in the present matter since $130,613 of the disallowance was barred by operation of the applicable statute of limitation. 20 U.S.C. §884 (1974).

made." (J.A.15). Indeed, the auditors specifically concluded that

> . . . the low-income percentages computed for school year 1972-73 were proper and were based on more precise information. The Essex County Welfare Board had furnished BOE [Newark] with a list showing the name and address of each child, age 5-17, in the ADC category. BOE [Newark] converted this data into attendance area statistics. *Thus, BOE [Newark] had available for the first time statistics indicating the total number of children from low-income families residing in the school attendance area, inclusive of drop-outs and attendees at public, non-public and special education schools.* (Emphasis added) (J.A.26).

There were, therefore, no audit exceptions for 1972-73, the final year of the Newark audit report.

By letter dated, June 20, 1975 the HEWAA report was transmitted to the New Jersey Department of Education thereby commencing an administrative process which was to continue until 1980 (J.A.9 to J.A.10). This Report was followed on June 11, 1976 by a Final Audit Determination Letter demanding that New Jersey refund $1,161,917 to the Office of Education.

In its application for review, dated October 21, 1976, the State of New Jersey advanced its substantive challenges to the Final Audit Determination. The State argued, at the outset, that the attendance areas declared ineligible by the federal auditors were, in fact, eligible for Title I assistance.[7] In support of this position, the State submitted re-

[7] Although New Jersey acknowledged before the Education Appeal Board that Newark had applied a "flawed" formula to determine the eligiblity of school attendance areas, New Jersey has consistently

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calculations of Title I eligibility. These recalculations measured eligibility by comparing the total number of ADC children from each attendance area actually enrolled in public elementary and secondary schools with the total number of children from the area actually enrolled in public elementary and secondary schools. The formula employed by the State therefore responded to the auditors' criticism of the Newark methodology since the component elements were directly related. More importantly, unlike the federal recalculations, it did not remove ADC children in secondary schools from the formula; rather, it simply added all children in public secondary schools to the comparison. The State's recalculations, therefore, more accurately reflected the number of low-income children attending public schools in the various attendance areas than did

(Footnote continued from preceding page)

maintained throughout this protracted litigation that the 13 controverted attendance areas were indeed eligible to receive Title I moneys (Pet. App. 35a to 36a; 49a to 56a; PNJa55; PNJa69; PNJa74 to PNJa77). Particularly instructive in this regard is the complete excerpt from the June 21, 1979 hearing before the Education Appeal Board cited by both the Secretary (Pet. B. 11 n.5) and *Amicus* (B. 10 n.22):

> "We recognize, and these calculations are in fact an acknowledgement of the fact that there were irregularities in the original grant approval process. In fact, we have never denied that.
>
> "What the [New Jersey] recalculations represent is an attempt by the State to show *that the areas involved were in fact eligible for assistance under Title I that children who Congress meant to be served by Title I were in fact served and that the mission of the statute was in fact met* . . . (PNJa516) (emphasis added).

those of the federal auditors.[8] In the alternative, New Jersey argued that the whole of the Newark school district, which had a district-wide low-income percentage of 33.9%, qualified for designation as a Title I area under applicable regulations and in accordance with the clearly expressed intent of Congress (J.A.71 to J.A. 73).

In addition to these substantive challenges to the validity of the final audit determination, New Jersey argued that the United States Department of Education was without

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[8] Following is a comparison of the eligibility calculations performed by the federal auditors and the State of New Jersey:

1971

Low Income Percentage

	Calculation of HEWAA Auditors	Calculation of New Jersey
Madison	28.8%	39.7%
Newton Street	31.5	42.8
So. 17th Street	33.5	40.3
Central Avenue	29.5	41.4
Burnet Street	30.2	39.0
Waverly Avenue	31.9	37.2
Franklin	32.4	34.8
M. Garvey	22.9	36.1
Garfield	20.6	26.0
Hawkins	30.3	25.9

(Pet. App. 53a)

The State did not submit calculations for the secondary schools since it was the State's position that, under the applicable rules, only elementary attendance areas had to qualify as eligible attendance areas (PNJa371). Indeed, the *Guidlines: Special Programs for Educationally Deprived Children* (OE-35079) 23, specifically provided:

> In general, a secondary school whose attendance area comprises several elementary schools with high concentrations of children from low-income families should also be considered an eligible area for a project.

statutory authorization to order New Jersey to repay moneys received under Title I grants in the 1970-71 and 1971-72 school years.

The Education Appeal Board rejected both the jurisdictional and substantive arguments advanced by New Jersey and demanded that the State repay $1,031,394 to the United States Office of Education.[9] By letter dated May 7, 1980, New Jersey was advised that the Panel's Decision was the final decision of the United States Department of Education.[10]

A Petition for Review of the decision of the Secretary of Education was filed with the United States Court of Appeals for the Third Circuit pursuant to 20 U.S.C. §2851. In it, New Jersey once again advanced both its substantive and jurisdictional arguments. In an opinion issued

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[9] The members of the Education Appeal Board were clearly troubled, however, by disallowances which resulted from the high level of poverty in the Newark school district (PNJa568 to PNJa 572). Indeed, Counsel for the Office of Education responded to such concerns by noting that Congress had "corrected" this situation by permitting attendance areas with a certain low-income percentage to "automatically be considered eligible" for Title I funding (PNJa 572). However, the Education Appeal Board, in reaching its decision, observed that it was "not authorized to determine whether the regulations are consistent with the statute and the expressed legislative intent . . ." but ". . . must apply the regulations on the assumption they are valid" (Pet. App. 57a).

[10] The Secretary, by this decision issued in 1980, found 13 attendance areas in Newark ineligible to receive Title I moneys notwithstanding the federal auditors' finding that 7 of those 13 areas had levels of poverty in excess of 30% and notwithtanding the fact that Education's own regulation, in effect since 1976, recognized as automatically eligible for Title I funds, 30% areas. The Secretary, by this decision, found the 13 areas ineligible even though 10 of the 13 areas had concentrations of low-income families in excess of 25% and even though Congress, in the 1978 Amendments to the ESEA, clearly articulated its intent that these 25% areas be eligible for Title I funds.

October 13, 1981, the Third Circuit granted the Petition of Review, reversed the order of the Department of Education and remanded with instructions "to vacate the orders requiring a repayment by petitioners of previously received Title I funds." *State of New Jersey, Dept. of Educ.* v. *Hufstedler*, 662 F.2d 208, 219 (3d Cir. 1981). Since the Third Circuit concluded that the Department of Education was without authority to issue the Order before it, the substantive challenges advanced by New Jersey as to the correctness of the audit determination were not reached.

This Court granted *certiorari* and reversed, concluding that the pre-1978 version of the Elementary and Secondary Education Act contemplated that states misusing federal funds would incur a debt to the Federal Government for the amount misused. *Bell* v. *New Jersey*, —— U.S. ——, 103 S.Ct. 2187, 76 L.Ed.2d 312 (1983). The Court also found that the Secretary had followed the proper procedures in administratively determining the amount owed by the states to the Federal Government. However,

> [w]hether that determination is supported by substantial evidence and by application of the proper legal standards is a question for the courts, if the affected parties seek judicial review. Here, New Jersey and Pennsylvania sought that review, and we remand to the Court of Appeals to permit it to undertake to review the challenges raised by each State to the Secretary's determination.[11] *Bell, supra*, 103 S.Ct. at 2198, 76 L.Ed.2d at 328.

Furthermore, the Supreme Court having only decided that states can be held liable for the misuse of funds, left

[11] Upon remand, the Third Circuit designated one of its judges to hold conferences with the respective parties in order to determine whether the matters could be settled. Although the *Pennsylvania* case settled, efforts to resolve the *New Jersey* matter failed. An Order was, thereafter, issued on September 27, 1983 directing the parties in the *New Jersey* case to file supplemental briefs.

> . . . for the Court of Appeals on remand the question of whether the substantive standards of the ECIA or the 1978 amendments can apply to grants approved and paid under the pre-1978 ESEA. *Bell, supra*, 103 S.Ct. at 2192, 76 L.Ed.2d at 321.

In his concurring opinion, Justice White further noted

> . . . these cases do not involve any question as to the substantive standard by which a claim that a recipient has violated its Title I commitments is to be judged. Rather, they concern the abstract question whether the Secretary has the right to recover Title I funds under any circumstances. In my view, *there is a significant issue whether a State can be required to repay if it has committed no more than a technical violation of the agreement* or if the claim of violation rests on a new regulation or construction of the statute issued after the State entered the program and had its plan approved. (Emphasis added) *Bell, supra*, 103 S.Ct. at 2199, 76 L.Ed.2d at 329.

Although pressed by New Jersey to do so, the Third Circuit on remand did not address this "significant issue" articulated by Justice White.[12] Rather, it decided, in a

[12] The *New Jersey* case on remand was briefed and argued subsequent to the decision of the Sixth Circuit in *Com. of Ky., Dept. of Educ.* v. *Secretary of Educ.*, 717 F.2d 943 (6th Cir. 1983). Arguing in the alternative, New Jersey urged the Third Circuit to follow the Sixth Circuit decision and address the significant issue left open in *Bell*. New Jersey contended that the Newark Title I program for the 1971-72 school year was in substantial compliance with the requirements of Title I of the ESEA and any mere technical violation which may have occurred in determining attendance area eligibility did not justify the imposition of the repayment sanction against it (PNJsb27 to PNJsb35). The Third Circuit declined to decide the case on this basis. Had it done so, New

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particularly restrictive fashion, the precise issue left it by this Court, *i.e.*, whether the substantive standards of the 1978 Amendment apply to the Newark Title I program. The court found initially that the eligibility standards contained in the Title I regulation, 45 C.F.R. §116.17(d) (1972), worked an "injustice . . . on areas with high concentrations of low-income families." *State of N.J., Dept. of Educ.* v. *Hufstedler*, 724 F.2d 34, 36 (3d Cir. 1983). It found that Congress had enacted, as part of the 1978 Amendments to the ESEA, a 25% eligibility standard to prevent these inequities. 20 U.S.C. 2732(a)(1). This standard permitted local educational agencies, such as Newark, to declare school attendance areas eligible for Title I funds if at least 25% of the children in those areas are from low-income families and if certain conditions are met. The court found that 25% standard was included in the 1978 Amendments "to correct regulations that frustrated the basic objectives of the Title I program." *Id.* at 36-37. Since the Secretary's application of the discredited Title I regulation to Newark continued precisely the same injustices as Congress sought to correct by enacting the 25% standard, the Third Circuit concluded that the eligibility of Newark's school attendance areas should be measured by that corrective standard.[13] The matter was

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Jersey would have been relieved of responsibility for repaying any federal moneys. Under the Third Circuit's more restrictive holding, New Jersey is only relieved of responsibility for repaying Title I funds expended in attendance areas with levels of poverty in excess of 25% ($781,787) and only upon a demonstration that the conditions for the application of the 25% standard have been met. New Jersey, under the Third Circuit decision, must repay to the Secretary a minimum of $249,607.

[13] The Third Circuit determined to apply the corrective 25% standard to measure the eligibility of Newark's attendance areas

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remanded to the Secretary for additional proceedings wherein Newark would have the opportunity to demonstrate compliance with the conditions necessary to apply the 25% standard contained in the 1978 Amendments to the ESEA.[14]

The Third Circuit, in an Order entered on February 7, 1984, denied a Petition for Rehearing (Pet. App. 62a). On June 15, 1984, a Petition for a Writ of Certiorari was filed on behalf of the Secretary of Education which Petition was granted by this Court on October 1, 1984 (J.A.115).

Summary of Argument

The difficult and extremely narrow issue before this Court is whether Newark, during the 1971-72 school year, properly identified as "target populations" for the receipt of Title I moneys, thirteen attendance areas, ten of which, even according to the federal auditors' conservative recalculations, had levels of poverty ranging from 33.5% to 27.9%. Unlike other Title I matters which have been reviewed by federal courts, the Newark program implicated

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rather than address the validity *vel non* of the administrative regulation under which these attendance areas had originally been declared ineligible (PNJsb21 to PNJsb23). Had the court below not applied the 25% standard but invalidated the regulation, New Jersey would have been absolved of responsibility for the payback of any federal funds. However, under the Third Circuit's ruling, New Jersey must repay to the Secretary a minimum of all Title I moneys expended in Newark attendance areas which had a level of poverty below 25%.

[14] Following the decision of the Third Circuit, the State Department of Education and the Newark Board of Education have engaged in a joint effort to secure information and material necessary to demonstrate such compliance. The Secretary, however, has not acted to reopen the administrative proceeding before him.

neither the scope, size, or quality of the supplemental programs of reading, mathematics and bilingual education provided by Newark nor the eligibility of the disadvantaged students who participated in those programs. Indeed, the Secretary has never questioned those vital aspects of Newark's Title I program. Nor does this case involve possible violations of the supplanting prohibition nor the failure to meet the comparability requirements of Title I. Again, the Secretary has never suggested that Newark failed to comply with those fundamental Title I mandates. Further, as the Secretary himself concedes, there is no question in this case that Newark received the correct amount of Title I moneys for the audit period. Finally, as the record clearly demonstrates, the Newark targeting issue was an isolated problem existing only in the 1971-72 school year and as a direct consequence of the unavailability of complete statistics for Newark's children from low-income families. When complete statistical information was made available to it in 1972-73, Newark utilized it to correctly determine attendance area eligibility and was found to be in compliance with the targeting regulation.

Under the Title I legislation, attendance area eligibility or targeting is a preliminary step in the process whereby target populations of children are identified and thereafter considered for participation in Title I activities on the basis of educational deficiency and the need for special services. At the time of the Newark audit, Title I itself simply provided that Title I funds should be "targeted" to "school attendance areas having high concentrations of children from low-income families." 20 U.S.C. §241c(a)(1). The administrative targeting regulation, effective at the time, however, restricted eligible attendance areas to those which had a level of poverty equal to, or in excess of, the district-wide level of poverty. This restrictive targeting regulation, rigidly applied by the agency to require mathematical exactitude, leads to an anomolous situation in extremely poor districts. Children living in

attendance areas with concentrations of poverty as high as 20%, 25%, 30% or even 33.5% would be denied needed remedial programs simply because they lived in a school district with an excessively high level of poverty. Had those children lived in more affluent school districts, they would have received the educational programs essential to meet their specialized needs.

Congress, firmly committed to providing needed assistance to disadvantaged children in very poor school districts, recognized that in districts where the district-wide level of poverty is extremely high, *i.e.*, between 30% and 40%, *all* children in the district could properly be considered a "target population" for Title I services. Moreover, increasingly disgruntled with the restrictive targeting regulation, rigidly enforced by the Secretary to the disadvantage of poor children within poor districts, Congress acted to correct that deficient regulation and harsh administrative practice through the 1978 Amendments to the ESEA. As part of that enactment, Congress included a 25% eligibility standard making it absolutely clear that children living in attendance areas with levels of poverty in excess of 25% or 30% should have the opportunity to participate in Title I programs regardless of the district-wide level of poverty.

The audit of the Newark Title I program projects the exact situation which Congress acted to correct in 1978 when it adopted the 25% eligibility standard. Since the district-wide level of poverty in Newark in 1971-72 was 33.9%, the federal auditors declared 13 attendance areas which had levels of poverty below 33.9% ineligible for federal funding. Even pursuant to the federal auditors' conservative recalculations, 10 of these areas had levels of poverty ranging from 33.5% to 27.9%. Had these attendance areas been within the overwhelming majority of school districts in the United States they, and their disadvantaged children, would have been eligible for receipt of Title I services.

On remand, the Third Circuit confronted the issue left to it by this Court—whether to measure the eligibility of Newark's attendance areas by the 25% standard contained in the 1978 Amendments to the ESEA or to apply the long discredited "targeting" regulation which would render ineligible any area where the level of poverty was not precisely at 33.9%, Newark's district-wide level of poverty. In deciding this troublesome issue, the Third Circuit did what courts of equity historically do—it attempted to give full effect to the policy of the Legislature. In resolving this difficult issue, the Third Circuit did what courts traditionally do when asked to give retroactive application to a statute—it carefully weighed and balanced the relative equities on both sides of the issue.

The court, after fully reviewing the Title I legislation and its history, concluded that Congress always intended that the benefits of this important federal program would be available to disadvantaged children living in areas with high concentrations of poverty and never anticipated that poor children would be denied Title I programs simply because they lived within extremely poor school districts. Indeed, dissatisfied with the restrictive targeting requirement, inflexibility applied by the Office of Education, Congress acted affirmatively and unambiguously to correct those discordant administrative regulations and practices by enacting as part of the 1978 Amendments to the ESEA a 25% eligibility standard. The Third Circuit determined to measure the eligibility of Newark's attendance areas by this 25% standard. To do otherwise, to apply the long discredited targeting regulation, would simply continue those inequities which the 25% eligibility standard was designed to correct.

In measuring the eligibility of Newark's attendance areas by the corrective 25% standard, the Third Circuit faithfully adhered to this Court's ruling in *Bradley* v. *School Board of Richmond* since it applied the eligibility standard in effect at the time of its decision, since the intervening

statutory change concerned the precise issue pending before it on appeal, since there was no statutory direction or legislative history to indicate that the eligiblity provision could not be applied to pending audit claims and since the application of the 25% eligibility standard to the Newark program resulted in no harm to the federal government but rather served to further the clearly articulated objectives of the Title I program. The decision of the Third Circuit which advanced the fundamental purposes of the Title I legislation and which carefully weighed and balanced the equities as between the Secretary and the State of New Jersey is eminently fair and just, and, therefore, should be affirmed by this Court.

ARGUMENT

The decision of the Third Circuit, wherein the 25% eligibility standard of the 1978 Amendments to the ESEA was used to measure the eligibility of Newark's attendance areas should be affirmed by this Court since it faithfully advances the overriding congressional objectives in enacting and continually strengthening the Title I legislation and since it represents a just and fair resolution of the dispute between the Secretary and the State of New Jersey.

Upon remand from this Court, the Third Circuit was faced with the difficult choice of whether to measure the eligibility of attendance areas in Newark for Title I funds by an unduly restrictive administrative regulation in effect at the time of the Newark program in 1971 and 1972 or whether to measure eligibility by a subsequently enacted legislative standard which corrected that deficient administrative regulation.

The Secretary urged the court below to apply an administrative targeting requirement which limited eligible attendance areas to those which had a level of poverty equal

to, or in excess of, Newark's district-wide level of poverty: 33.9%. The Secretary also argued that this regulation should be applied to the Newark attendance areas with mathematical exactitude so that even an area with a 33.5% level of poverty should be declared ineligible for Title I funding. At the same time that the Secretary asked the court to apply this targeting requirement to Newark's attendance areas with rigid precision, he also opposed recalculations offered by New Jersey which would more accurately reflect the concentrations of children from low-income families in those areas. Finally, although the targeting regulation in place at the time of the Newark program permitted an entire district to be designated as an eligible Title I project area, the Secretary contended that Newark did not qualify for such designation since it had "wide variations" in the levels of poverty among its attendance areas. Accordingly, the Secretary asked the court to affirm his decision that thirteen attendance areas within the Newark school district be declared ineligible for Title I funding even though ten of those areas had levels of poverty ranging from 33.5% to 27.9%. Furthermore, the Secretary asked the Court to affirm his order that New Jersey repay $1,029,630 in Title I moneys expended in those thirteen Newark attendance areas even though those moneys were utilized by Newark to fund appropriate supplemental reading, mathematics and bilingual programs which were provided to eligible disadvantaged children in need of these specialized educational services and even though those attendance areas would have been eligible for Title I funding had they been within a more affluent school district and not within a district such as Newark which had an exceedingly high level of poverty.

The State, for its part, renewed the arguments previously made to the Third Circuit but not addressed in *State of New Jersey Dept. of Educ.* v. *Hufstedler*, 662 F.2d 208 (3d Cir. 1981) (PNJsb35). At the outset, New Jersey contended that its recalculations of Title I eligibility should be accepted by the court since they represented more

accurate approximations of the concentrations of poverty within Newark's attendance areas including as they did children from low-income families actually enrolled in public secondary schools as well as those children actually enrolled in public elementary schools. The State pointed out that this factor was particularly important for the 1971-72 school year since Newark did not have available complete statistical information for children from low-income families who were not actually attending the public schools but who were enrolled in private and parochial schools, in special schools or who had simply dropped out of the educational system. Since this gap in statistical information artificially compressed the levels of poverty throughout Newark's attendance areas, the further exclusion of ADC children attending the public secondary schools from the Title I calculations only served to further exacerbate the underreporting problem. New Jersey also argued that, even assuming the propriety of the federal auditors' conservative recalculations, the entire Newark school district was eligible for designation as a Title I project area under the 1972 targeting regulation since its district-wide level of poverty was 33.9%. In support of this argument, New Jersey pointed to the legislative history of Title I which confirmed that when 30 to 40% of the children in a school district are from low-income families "all of the children in the district could be considered disadvantaged and the whole system could be upgraded." H.R. Rep. No. 1814, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3846. The argument for district-wide designation in Newark was particularly compelling since during the period of the audit Newark's mobility rate was the highest in the nation, reaching as high as 80% for schools in the Title I area. Given Newark's extraordinarily high mobility rate, which translated into significantly shifting low-income populations among its attendance areas, New Jersey urged that district-wide designation of Newark as a Title I project area was appropriate under the targeting regulations in

effect in 1971 and 1972. An 80% mobility rate within the Newark district dramatically illustrates not only the inherent difficulty of amassing the precise, detailed statistical information required by the Secretary, but the fallacy of rigid adherence to attendance areas for determination of Title I eligibility for an impoverished district. Obviously, given that mobility rate, an attendance area's eligibility under the Secretary's rigid formula may (and probably will) shift during the entitlement period. In such circumstances, only a district-wide determination of eligibility can achieve the Congressional purpose in enacting Title I.

On remand, the State supplemented these arguments by urging the Third Circuit to affirmatively decide the issue left to it by this Court, *i.e.*, whether the substantive provisions of the 1978 Amendments to the ESEA should be applied to grants approved and paid under the pre-1978 ESEA. New Jersey submitted that the eligiblity provision contained in the 1978 Amendments to the ESEA, whereby attendance areas with levels of poverty in excess of 25% could receive Title I funds irrespective of the district-wide incidence of poverty, should be applied to measure the eligibilty of Newark's attendance areas. The State argued that the application of this statutory eligibility standard would be entirely appropriate since it corrected a seriously deficient administrative regulation which deprived educationally disadvantaged children living in areas with high concentrations of poverty of necessary compensatory educational programs, simply because they lived within school districts with extremely high levels of poverty.

The State argued in the alternative, on remand, that the sanction of repayment should not be imposed against New Jersey since the Newark Title I program provided appropriate supplemental programs of compensatory education to eligible disadvantaged children living in areas of high concentrations of poverty and was therefore, in substantial compliance with all requirements of Title I. In making

this argument, New Jersey urged the Third Circuit to follow the decision of the Sixth Circuit in *Com. of Ky., Dept. of Educ.* v. *Secretary of Educ.*, 717 F.2d 943 (6th Cir. 1983).

In considering whether to measure the eligibility of the Newark attendance areas by the corrective 25% eligibility standard or by the earlier more restrictive targeting regulation, the Third Circuit sought to do what courts of equity historically do, "give effect to the policy of the Legislature." *Mitchell* v. *DeMario Jewelry*, 361 U.S. 288, 292 (1960). Indeed, the polestar of the decision below is the legislative objective in establishing and strengthening the Title I program. In determining whether to apply the 25% eligibility standard or affirm the Secretary's inflexible application of his regulations, the Third Circuit declined to simply "rubber stamp" that administrative decision but rather carefully scrutinized it to determine whether it frustrated the congressional policy underlying the Title I program. *See Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, —— U.S. ——, 104 S. Ct. ——, 78 L. Ed. 2d 195 (1983). Finally, in deciding whether to apply the intervening statutory amendment to the Newark Title I program, the Third Circuit did what courts traditionally do when considering the retroactive application of a statute—it carefully balanced the interests on both sides of the issue. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203. *See* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

The Third Circuit, after carefully reviewing the legislative history of Title I and studying the relative equities as between the parties, refused to apply the long overruled targeting regulation finding that to do so would clearly offend the overriding objectives of the Title I legislation by denying the benefits of this important educational program to disadvantaged children simply because they lived within a school district of extreme poverty. Rather than apply the inflexible targeting requirement and

continue its inequitable consequences, the court below applied the 25% statutory eligiblity standard which corrected that discordant agency regulation and practice.

In determining to apply the 1978 eligibility standard, the Third Circuit scrupulously balanced the interests of the Secretary and the State of New Jersey. By choosing the 25% eligibility standard, the court applied the specific statutory provision which corrected the deficient administrative practice before it on appeal. In applying this statutory standard, the court held New Jersey responsible for the return to the Secretary of $247,845, the Title I moneys expended in attendance areas with levels of poverty below 25%. Had the Third Circuit simply invalidated the targeting regulations or, following the decision of the Sixth Circuit in the *Kentucky* case, found Newark in substantial compliance with the targeting regulations, Newark would have been completely absolved of responsibility for the full amount of the audit exception.

The decision of the Third Circuit which advanced the fundamental purposes of the Title I legislation and which carefully balanced the interests of the parties before it, is, therefore, eminently fair and should be affirmed by this Court. Indeed, the equitable result reached by the court below is in stark contrast to the inflexible and harsh position espoused by the Secretary who has adamantly refused to apply the targeting regulations in a manner tailored to address the unique problems faced by Newark, a large urban school district with an extremely high level of poverty and an even higher mobility rate among its various attendance areas. Indeed, unlike his decision in the *Kentucky* case where the Secretary, although finding a violation of the supplanting prohibition, waived 52% of the audit exception "for good cause shown," the Secretary in the present case has refused to waive any portion of the Newark disallowance even in the face of the unmistakable Congressional pronouncement that it never intended that attendance areas with levels of poverty in excess of 30%, and later 25%, should be denied Title I funding.

A. From the inception of the Title I program, the congressional objective has been to provide financial assistance to areas with high concentrations of poverty so that disadvantaged children will receive remedial programs designed to meet their unique educational needs; most assuredly, it has never been the intent of Congress to deprive eligible children of much needed educational programs simply because they live in school districts with extraordinarily high levels of poverty.

This case turns on the substantive provisions of the Elementary and Secondary Education Act which govern the eligibility of school attendance areas to receive Title I moneys. The provision of the ESEA in effect at the time in the Newark application was approved and the Title I moneys expended during the 1971-72 school year, 20 U.S.C. §241e(a)(1), simply provided:

> . . . payments under this subchapter will be used for programs and projects . . . (A) which are designed to meet the special educational needs of educationally deprived children *in school attendance areas having high concentrations of children from low-income families* . . . (Emphasis added).

The legislative intent in establishing this broad eligibility standard can only be ascertained by a careful review of the rich history of the Title I program which sought to sever the link between poverty and educational failure.

From the earliest days of Title I, Congress recognized that extremely poor school districts have unique problems and that the Title I program would have to be tailored to address those problems. A 1965 Senate Committee Report stated:

> It is the intention of the proposed legislation not to prescribe the specific type of programs or projects that will be required in school districts. Rather such matters are left to the discretion and judgment of the local public educational agencies. . . .

> What may be an acceptable and effective program in a school district serving a rural area may be entirely inappropriate for a school district serving an urban area, and vice versa. *There may be circumstances where a school system is basically a low-income area and the best approach in meeting the needs of educationally deprived children would be to upgrade the regular program.* On the other hand, in many areas the needs of educationally deprived children will not be satisfied by such an approach. S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1454 (emphasis added).

This Congressional concern with the particular needs of school districts with high levels of poverty was reaffirmed following the first year's experience under Title I. In its report on the first amendments to Title I, the House Labor and Education Committee stressed that administrative flexibility was to be the rule:

> We specifically pointed out that there may be circumstances where a whole school system is basically a low-income area and in which the best approach might be to upgrade the whole school system . . . *It is the feeling of the Committee that when 30 or 40 percent of the children in the district are from low-income families, all of the children in the district could be considered disadvantaged and the whole school system could be upgraded.* H.R. Rep. No. 1814, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3846 (emphasis added).

The original intent of the Title I legislation was again reaffirmed in the House Committee Report on the 1974 Amendments to the ESEA wherein it was emphasized:

> As originally conceived and as extended, Title I authority is basically centered in the local educational agency (the school district). The special needs of the educationally disadvantaged child and programs to meet those needs must be locally devised. This is consistent with the Congress' historical concern that local communities should, not in conflict with constitutional and legal precriptions, formulate educational policy. . . . *This is not consistent with strict Federal administration regulations which so narrowly define "target school" that a school in one local educational agency with 10% of its enrollment of "educationally deprived" is an eligible "target school," whereas a school in another local educational agency with 30% or more is not eligible as a target school.* While it is clearly the expressed objective to serve children in schools with high concentrations, *it was never intended by the Act to render any school with a 30% concentration ineligible.* H.R. Rep. No. 93-805, 93d Cong.. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4108 (Emphasis added)

Congress utilized the 1978 Amendments to the ESEA to fine-tune the components of the Title I program and to clarify those ambiguities and uncertainties which were thwarting the realization of its essential objectives. H.R. Rep. No. 1137, 95th Cong., 2d Sess., 1, 22 *reprinted in* [1978] U.S. Code Cong. & Ad. News, 4971, 4992. The extensive hearings conducted by the Subcommittee on Elementary, Secondary and Vocational Education prior to the enactment of the 1978 Amendments are particularly illuminating with regard to the eligibility issue before this Court. During the hearings, the House Subcommittee heard many complaints which centered upon the inequity of the Title I requirements which resulted in schools in needy urban areas being regarded as ineligible. *Elementary and Secondary Education; Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, Part*

18: *Administration of Title I of ESEA at 102; Part 21*: *The Administration's Proposal for Elementary and Secondary Education* at 635, 95th Con., 1st Sess. (1977). This anomaly in the Title I system resulted, in major part, from "federal regulations which compel the exclusion of large numbers of disadvantaged children as well as large numbers of schools with high concentrations of disadvantaged children." *Education Amendments of 1977: Hearings on S.1753 Before the Subcomm. on Education, Arts and the Humanities of the Senate Comm. on Human Resource, Part 1,* 95th Cong. 1st Sess. 92 (1978). The dilemma created by the federal regulations was aptly summarized by a witness before the Senate Subcommittee:

> Essentially a poor child in a relatively affluent district has a better chance of being in a target school and of getting services under Title I than does a similar child in a district with a high percentage of disadvantaged students. *Id.* at 93. *See also Part 12: National Organizations,* at 528-529.[15]

Distress over the inequitable situation where poor children attending schools in primarily decaying urban centers

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[15] This dissatisfaction with the federal administration of the Title I eligiblity standards was echoed by Mrs. Ruth Mancuso, testifying on behalf on the National Association of State Boards of Education:

> We have surveyed several states on a pilot basis and use Maryland as an example since information is fairly easy to obtain with its relatively few county districts (Exhibit C).
>
> In Baltimore City any school which has less than 30.3% Title I children was not eligible to receive Title I funds. This minimum is higher than the maximum incidence in schools receiving Title I funds in 11 other counties. This means there are schools in relatively affluent counties receiving Title I assistance with no more than 5% Title I children while schools in Baltimore City with 25-30% Title I children are excluded from the program. *Id.* at 392.

and isolated rural areas were denied the educational benefits of Title I programs was reflected in the House Report:

> . . . current OE regulations [45 C.F.R. §116a-20 (b)(2)] provide that any school attendance area with 30 percent or more children from low-income families (based on eligibilty for free lunch) may be designated a target area. . . . *The Committee bill reduces this minimum to 20 percent out of a concern that inflexible targeting requirement could force some school districts with very high incidences of poverty to declare schools with 20 percent low-income enrollment ineligible, while schools with only 10 percent low-income enrollment or less might be eligible in wealthier neighboring districts.* H.R. Rep. No. 1137, 95th Cong., 2d Sess. 22, *reprinted in* [1978] U.S. Code Cong. & Ad. News 4992.[16]

The 25% eligibility standard was, therefore, enacted by Congress as part of the 1978 Amendments to the ESEA to correct the serious inequities in the administration of the Title I program. 20 U.S.C. §2732(a)(1). This provision permitted a local school district to designate any attendance area with a 25% incidence of poverty as eligible for Title I funding so long as certain conditions are met.

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[16] See the Joint Explanatory Statement of the Committee of Conference indicating that by Senate amendment, the minimum percentage was raised to 25%; it is that minimum which was enacted as part of the 1978 Amendments to the ESEA. H.R. Conf. Rep. No. 1753, 95th Cong., 2d Sess. 255, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5158. The regulation referred to in the text was that in place as of 1976 under which seven of the Newark attendance areas involved here would have concededly been eligible. Yet, the Secretary, in his audit determination, steadfastly refused to give Newark the benefit of even this overly restrictive regulation. Contrast this action with the Secretary's decision in the *Kentucky* case, also before this Court, where he at least forgave over half the audit indebtedness based on the equities presented. *Com. of Ky., Dept. of Educ. supra,* 717 F.2d at 944.

Under this provision, 25% attendance areas could be appropriate targets for Title I moneys regardless of the district-wide level of poverty.

In 1981, Congress acted again to simplify the program whereby federal financial assistance is provided for the education of disadvantaged children. As part of the Omnibus Budget Reconciliation Act of 1981 (P.L. 97-35), it adopted the Education Consolidation and Improvement Act (ECIA) in an attempt to provide federal assistance "in a manner which will eliminate burdensome, unnecessary Federal supervision, direction and control." 20 U.S.C. §3801. Congress also found that federal assistance to meet the educational needs of children from low-income families would be more effective:

> . . . if educational officials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program. *Id.*

Chapter 1, which replaced Title I, further liberalized the provisions governing the eligibility of attendance areas. It provided that Chapter 1 programs and projects could be:

> (1) (A) . . . conducted in attendance areas having the highest concentrations of low-income children,
>
> (B) . . . located in all attendance areas of an agency which has a uniformly high concentration of such children; or
>
> (C) . . . designed to utilize part of the available funds for services which promise to provide significant help for all such children served by such agency. 20 U.S.C. §3805(b).

Although it was the objective of the ECIA to grant greater flexibility to local school districts and to minimize restrictive administration regulations and practices, technical imprecision in the language of the Act created uncertainties as to whether certain options, available under Title I, continued under Chapter 1. To "dispel ambiguities, to eliminate unintended results and correct drafting errors" which arose because of the manner in which the ECIA was enacted [as part of the Omnibus Budget Reconciliation Act of 1981], the 1983 Amendments to the ECIA were adopted. H.R. Rep. No. 98-51, 98th Cong., 1st Sess. *reprinted in* [1983] U.S. Code Cong. & Ad. News 2188. These amendments dispelled any doubt that the option of designating 25% attendance areas available under Title I continued under Chapter 1. Recognizing that the 25% option " has been particularly useful for the poorest school districts," the Amendments specifically permit school districts to designate as eligible for Chapter 1 funds any school attendance area in which at least 25% of the children are from low-income families. *Id.* at 2189, 2191. 20 U.S.C. §3805(d)(1).

From the legislative history of Title I, now Chapter 1, it is abundantly clear that Congress always intended that the benefits of this important federal program would be available to disadvantaged children living in areas of high concentrations of poverty. Congress never anticipated that poor children would be denied these remedial programs simply because they live in school districts of extreme poverty. Indeed, when the Office of Education developed restrictive eligibility regulations which were inflexibly applied to preclude the flow of Title I benefits to disadvantaged children, Congress acted affirmatively and unambiguously to correct those rigid administrative practices which did not further, but rather frustrated, the important objectives of the Title I program.

B. The Title I eligibility regulations, inflexibly enforced by the Department of Education to deny needed Title I programs to disadvantaged children living in attendance areas in Newark with concentrations of poverty ranging from 33.5% to 27.9%, is a rule out of harmony with the clearly articulated goals of the Title I program.

The administrative regulations which implemented the statutory standard for Title I eligibility in 1972 defined eligible attendance areas as those in which the estimated number or percentage of children from low-income families *is as large as, or greater than,* the estimated average number or percentage of such children in the school district as a whole. The Office of Education, and its successor, the Department of Education, rigidly interpreted these regulations as requiring mathematical exactitude. Further, the 1972 regulations did not contain a provision which rendered attendance areas with a certain level of poverty, *i.e.* 30%, automatically eligible for Title I assistance. This 30% provisions was not added until 1976. 45 C.F.R. §116a 20(b)(2). The 1972 regulations, however, did permit entire school districts to be designated eligible for Title I funding but only if there was no wide variance in the number or percentage of children from low-income families within the district. The Department's unyielding application of the "no wide variance" rule excluded from district-wide eligibility large urban school districts with extremely high levels of poverty since the incidence of poverty within these districts were not uniformly distributed throughout each and every geographic area. The failure to include in the Title I regulations an absolute poverty level at which attendance areas could qualify for Title I funding, together with the agency's inflexible application of its "no wide variance" rule, worked a hardship on high poverty school districts and, more importantly, upon their disadvantaged children. By virtue of the harsh application of this targeting requirement, a child in need of specialized educational services living in

a Newark attendance area with a level of poverty at 33.5% would be denied those educational services while a similar youngster within a more affluent district would receive them.

It is clear from a review of the Title I legislation and its history that these targeting regulations which produced such an anomaly are not only unsound as a matter of policy but are of dubious legal validity. It is well-established that in order for a regulation to be regarded as sound, it must be consistent with the statue under which it is promulgated. *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977). The power of an administrative officer or agency "to administer a federal statute and to prescribe rules to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Manhattan General Equip. Co.* v. *Comm'r*, 297 U.S. 129, 134 (1936). The Judiciary is the final authority on issues of statutory construction and must reject administrative regulations which are contrary to clear legislative intent. *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. ——, 104 S.Ct. ——, 81 L.Ed.2d 694, 703, n. 9 (1984). A regulation which fails to carry out the legislative intent, but rather operates "to create a rule out of harmony with the statute, is a mere nullity." *Manhattan General Equip. Co., supra* at 134; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14 (1976); *Dixon* v. *United States*, 381 U.S. 68 (1965). A regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's origin and purpose. *U.S.* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982).

Although the courts recognize that a presumption of validity attaches to administrative regulations, that presumption only exists so long as the regulations are shown to be consistent with the statute they implement. *United States* v. *Larionoff, supra.* The degree of respect to be accorded to an agency's interpretation of a statute will vary depending upon such factors as the interpretation's

inherent reasonableness, its basis in the statutory text and legislative history, subsequent congressional action and whether it is based upon experience or expertise peculiarly within the agency's ken. *SEC* v. *Chenery Corp., supra,* 332 U.S. at 215; *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944); *Office of Consumer's Counsel* v. *Fed. Energy Reg.,* 655 F.2d 1132, 1141 (D.C. Cir. 1980). Another relevant consideration is the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute. *Nat'l Muffler Dlrs. Ass'n.* v. *U.S.,* 440 U.S. 472 (1975).

Of primary importance in analyzing the validity of 45 C.F.R. §116.17(d) (1972) is the intent of Congress in enacting Title I and the legislative history of this major federal program. The statutory eligibility standard for receipt of Title I moneys was simply that ". . . payments . . . will be used for programs and projects . . . designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families. . . ." Furthermore, legislative history reveals that one of the essential purposes of Title I was "directing substantial amounts of federal aid to districts experiencing difficulties in funding adequate educational programs due to concentrations of low-income families." H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 5 (May 11, 1978). Congress clearly did not intend to deprive funding to an area with such remarkably high incidences of poverty as Newark.

Quite to the contrary, as fully discussed *ante* at 27-33, Title I is replete with positive evidence of Congress' steadfast concern with the unique problems of extremely poor school districts and its commitment that eligible children within those districts not be denied necessary programs. The history of this program further demonstrates close scrutiny by Congress over the Department of Education to prevent harsh and inflexible agency practices which

might frustrate rather than further the basic objectives of Title I. Indeed when Congress has discerned any discordant practices, it has acted firmly and unambiguously to correct unduly restrictive agency action.

The designation of an entire district as a Title I project area is an early example of this interplay between the Congress and the then Office of Education. At the time of the original enactment of Title I, and when considering the 1966 Amendments to that federal program, it was recognized that there were circumstances where an entire school system would be an appropriate target for Title I services. Indeed, it was the position of the House Labor and Education Committee that "when *30 or 40 percent* of the children in the district are from low-income families, all the children in the district could be considered disadvantaged and the whole system could be upgraded." H.R. Rep. No. 1814, 89th Cong., 2d Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 3846 (Emphasis added). Apparently to effectuate that Congressional policy, a provision was incorporated in the targeting regulations which permitted district-wide Title I designations. However, that rule failed abysmally to carry out the Congressional intent since it only permitted district-wide designations if there was "no wide variance" in the concentrations of poor children throughout the district. By adopting and stringently enforcing the "no wide variance" rule, the Office of Education effectively precluded districts such as Newark from achieving district-wide Title I designations as was clearly intended by Congress.

Indeed, as demonstrated by the Newark situation, it is wholly unrealistic to expect that poor families in large urban cities will be evenly distributed throughout every geographic area of those cities. During the committee hearings on the 1978 Amendments to the ESEA, there was testimony that large school districts could not qualify as a single attendance area under the "no wide variance" rule. *Elementary and Secondary Education; Hearings of*

H.R. 15 Before the Subcomm. on Elementary Secondary and Vocational Education of the House Comm. on Education and Labor, Part 16: Services and Student Development, 95th Cong., 1st Sess., 584-585 (1977). This testimony was consistent with the National Institute of Education study which found that without exception, the only districts which qualified under the "no wide variance" rule were small districts with enrollments under 5,000. *Id.* In sharp contrast, the student population in Newark during the 1971-72 school year was 82,894.

An even more striking example of Congressional concern with poor school districts and the children living within their boundaries can be found in the House Committee Report on the 1974 Amendments to the ESEA. The Committee members were particularly critical of

> *"... strict Federal administration regulations which so narrowly define 'target school' that a school in one educational agency with 10% of its enrollment of educationally deprived is an eligible 'target school,' whereas a school in another local educational agency with 30% or more is not eligible as a target school.* While it is clearly the expressed objective to serve children in schools with high concentrations, *it was never intended by the Act to render any school with a 30% concentration ineligible."* H.R. Rep. No. 93-805, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Cong. Code & Ad. News 4108 (Emphasis added).

Ironically, at the time of this clear articulation of Congressional intent not to render any school with a 30% concentration of children from low-income families ineligible for Title I services, the HEWAA auditors were doing precisely that in Newark.

In an apparent response to this pointed criticism of its inflexible administrative practices, the Office of Education did modify its targeting regulation in 1976 to permit 30%

attendance areas to receive Title I funds irrespective of the district-wide level of poverty. 45 C.F.R. §116a20(b)(2), 41 F.R. 42914 (September 28, 1976). However, Secretary Hufstedler, in her 1980 decision in the present matter, eschewed application of her regulation and found seven attendance areas, which according to the conservative recalculations of the federal auditors, had concentrations of poverty in excess of 30%, to be ineligible for receipt of Title I moneys. The federal moneys expended in these 30% areas totaled $563,221. Therefore, had the Secretary applied the Title I 30% rule to the Newark audit, the Newark disallowance of $1,029,630 would have been reduced to $468,083.

Finally, as has already been fully discussed *ante* at 29-32, Congress, still dissatisfied with agency practices which "forced school districts with very high incidences of poverty to declare school districts with 20% low-income enrollment ineligible, while schools with only 10 per cent low-income enrollment or less might be eligible in wealthier neighboring districts," incorporated as part of the 1978 Amendment to the ESEA a 25% eligibility standard. H.R. Rep. No. 1137, 95th Cong., 2d Sess. 22, *reprinted in* [1978] U.S. Code Cong. & Ad. News 4992. Under this provision, attendance areas with concentrations of poverty in excess of 25% cannot be rendered ineligible simply because they are situated in an extremely poor school district such as Newark which had a district-wide level of poverty of 33.9%. More to the point, disadvantaged children would no longer be made to pay the educational price for living in a poor rather than a more affluent school district. To eliminate any uncertainty that the 25% eligiblity standard was continued in Chapter 1 of the ECIA, which replaced Title I of the ESEA, the 25% option was specifically included by the 1983 Amendments to the ECIA. In the House Report on these amendments, the members cogentiy observed that the 25% option "has been particularly useful for the poorest school districts."

H.R. Rep. No. 98-51, 98th Cong., 1st Sess., *reprinted in* [1983] U.S. Code Cong. & Ad. News 2189.

There can be no doubt from this legislative history that the unambiguous objective of the Title I program was to provide disadvantaged children living in areas with high concentrations of poverty with specialized educational programs designed to meet their unique educational needs. It was never intended under the Title I program that disadvantaged children would be deprived of these valuable educational programs simply because their attendance areas were within extremely poor school districts. The restrictive Title I regulations, which rendered Newark attendance areas with levels of poverty ranging from 33.5% to 27.9% ineligible for Title I funds simply because the level of poverty in those areas did not exceed the district-wide level of 33.9%, is clearly out of harmony with the objectives of the Title I program. More importantly, those restrictive regulations, inflexibility administered by the Department of Education to deny needy children in poor districts Title I programs, were specifically rejected by Congress when it enacted the 25% eligibility requirement as part of the 1978 Amendments to the ESEA.[17] This

[17] The Secretary appears to concede that Congress did reject the policy underlying the "earlier" targeting regulations which required attendance areas to be at, or in excess of, the district-wide levels of poverty to qualify for Title I funds and which provided no relief for extremely poor school districts. However, the Secretary goes on to argue that since, at the time of the 1978 Amendments, the Title I regulations contained a 30% eligibility standard, the Congressional action in adopting a 25% standard "represented a fine tuning of the statute" from experience gained under the later regulation (Pet. Reply M. 3, n. 4). This contention is rather disingenuous since it ignores the fact that the Title I regulation at issue before this Court is not the "later" regulation with a 30% standard but the "earlier" targeting regulations which had no such standard. It is precisely this earlier, rigid, inflexible "targeting" regulation, rejected by the Congress in its establishment of a 25% standard, which the Secretary harshly applied to render attendance areas in Newark ineligible for Title I programs even though they had levels of poverty ranging from 33.5% to 27.9%.

discredited regulation should not have been used to measure the eligiblity of the Newark attendance areas since the regulations subverted the goals of that important educational program.

C. The Third Circuit correctly measured the eligibility of Newark's attendance areas by the 25% eligibilty standard enacted as part of the 1978 Amendments to the ESEA and not by the Title I regulation which, contrary to the objectives of the Title I program, ignored the unique probems of extremely poor school districts.

It is a basic tenet of American jurisprudence that a court is to apply the law in effect at the time of the decision unless manifest injustice would result from doing so or there is statutory direction or legislative history to the contrary. *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696, 711 (1974). Although *Bradley* provides the clearest statement of this rule, it has its origin in *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), which succinctly explains:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Schooner Peggy, supra, 1 *Cranch* at 110 (footnote omitted).

Courts have routinely adhered to the principle articulated in *Schooner Peggy,* applying the law as they have found it at the time of decision even though the law may have changed by virtue of constitutional amendment, *United States* v. *Chambers,* 291 U.S. 217 (1934) (Twenty-first Amendment passed, prosecution dismissed); intervening statute, *Ziffrin, Inc.* v. *United States,* 318 U.S. 73 (1943) (Principle applied to intervening change in *state* law), *Carpenter* v. *Wabash Ry. Co.,* 309 U.S. 23 (1940) (Principle applied to intervening change in *federal* law) or jurisdictional decision, *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538 (1941); *Hamling* v. *United States,* 418 U.S. 87 (1974) reh. den. 419 U.S. 885 (1974).

This principle has been applied to give retroactive application to both procedural and substantive changes in the law. Illustrative of the latter, is the decision of the Court in *Carpenter* v. *Wabash Ry. Co., supra,* where a plaintiff had moved to disolve an equity receivership of a railroad because of, *inter alia,* an alleged error in the appointed master's ruling that his personal injury judgment was an unsecured claim against the railroad. While a petition for a writ of *certiorari* was pending, Congress passed an amendment to the bankruptcy act wherein pending equity receiverships were to recognize claims based on personal injury judgments as preferred and were to pay such claims out of the railroad's assets as operating expenses. The Court, relying on its decision in *Schooner Peggy,* applied the law at the time of decision. In *Thompson* v. *Sawyer,* 678 F.2d 257 (D.C. Cir. 1982), female bindery workers at the Government Printing Office brought a sex discrimination suit. Relief was sought under the Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act, 29 U.S.C. §206(d) (1976), and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1976). While

the matter was pending in the district court, the definition of employer under the Fair Labor Standards Act was amended to include public employers. Citing the *Bradley* analysis, the Court of Appeals for the District of Columbia Circuit upheld the district court's decision that the defendants were retroactively liable for damages under the Fair Labor Standards Act amendments of 1974. *Id.* at 279-281.

The decision in *Schooner Peggy* did not make clear, however, whether a change in the law while a case was pending was to be given effect only where the law, by its own terms, was to apply to pending cases, as was true in *Schooner Peggy,* or whether the change in the law must be given effect unless it was clear from the law that it was not to apply in pending cases. This question was answered definitively in *Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268 (1969) where the Court broadly interpreted the *Schooner Peggy* decision to apply in all situations where there is a change in the law and not just when the law by its own terms demands application in a pending case. *Thorpe, supra,* 373 U.S. at 282. The Court further stated that the presumption is to apply a change in the law in a pending case unless there is a clear indication that it was not meant to apply to pending cases. *Ibid.*

The rule originating in *Schooner Peggy,* reaching its full development in *Thorpe,* has had its most modern expression in *Bradley* which establishes a presumption in favor of the retroactive application of new statutes to judgments pending on review but a presumption which may be displaced either by a fair indication that the statute, properly construed, has only prospective effect or by resulting injustice from a retroactive application. *Bradley* v. *School Board, supra,* 416 U.S. at 716-17.

A review of the 1978 Amendments to the ESEA, including the corrective eligibility standard here under con-

sideration, discloses no positive statutory direction against their retroactive application.[18] Indeed, in his concurring opinion in *Bell* v. *New Jersey, supra,* 103 S.Ct. at 2199, Justice White specifically found:

> Here, nothing in the 1978 amendments or the legisaltive history suggests that the amendments were not intended to be applied retroactively, and their application . . . would not result in manifest injustice.

The legislative history of the Amendments, however, does contain positive evidence that their purpose was to refocus the Title I program so that it would achieve its basic objective of providing educational programs to meet the special needs of children from low-income families living within the areas of high concentrations of poverty. Indeed, as fully developed *ante* at 29-32, the legislative history surrounding the enactment of the corrective 25% eligibility standard, the specific provision of the 1978 Amendments before this Court, clearly supports its use to measure the eligibility of the Newark attendance areas for receipt of Title I moneys. The enactment of this eligi-

[18] The Secretary's reliance upon 20 U.S.C. §2702 to show the contrary is clearly misplaced. This provision merely "extends the period during which payments may be made under this title to September 30, 1983" H.R. Rep. 95-1137, 95th Cong., 2d Sess, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5122. It provides no indication as to whether the substantive provisions of the Amendments, including the corrective eligiblity provision, should be applied to pre-existing grants. Nor does the Secretary find support for his position in the "holding" of the Comptroller General that "changes in appropriations or authorization statutes must be applied prospectively only" (Pet. B. at 26). Again, the Secretary fails to address the issue of whether the substantive provisions of the 1978 Amendments should be applied retroactively as contrasted with those provisions which "authorize" the Secretary to continue to make payments under the sub-chapter or which specifically appropriate public moneys for a particular program.

bility standard reformed administration of the Title I program so that the children it was meant to serve—educationally deprived children living in areas with high concentrations of poverty, would not be denied the benefits of much needed educational programs. Not to do so would be to judge the eligibility of these attendance areas by a regulation which, following the Newark audit, was modified by the agency itself and which, most significantly, was specifically overruled by the 25% eligibility standard of 1978 Amendments.

The application of the 25% standard[19] to the Newark Title I program is particularly appropriate under the *Bradley* rationale. As in *Bradley,* the statutory change concerns the precise issue *i.e.* the eligibility of school attendance areas for Title I funding, which is pending on appeal. Of course, *Bradley* is not to be narrowly construed as only permitting consideration of an intervening statute when issues affected by that statute are already on appeal. *Litton Systems, Inc.* v. *American Telepone & Telegraph Co.,* No. 83-7744 (2d Cir. Oct. 16, 1984). However, when such situation exists, as it does presently, the argu-

[19] The deletion from the legislative proposal in conference of a provision which would have required, *inter alia,* the application of the 25% standard to any pending audits of pre-1978 expenditures is offered by the Secretary as evidence of Congress' belief that the pre-1978 administrative practices were fair (Pet. B at 23, n.12). Nothing could be wider of the mark. The House Amendment, H.R. 11, sought major revisions in the audit determination procedures in GEPA with the application of the 25% eligibility standard simply one element in that overall revision. In reviewing the House Amendment, the Senate recognized that "State and local educational agencies have legitimate and long-standing complaints with respect to the fairness and due process of the education auditing proceess." H.R. Rep. 98-1128, 98th Cong., 2d Sess, 53-54 (1984); 130 Cong. Rec. H.10756 (daily ed. Oct. 2, 1984). According to the Senate report, the provision was deleted in conference so that there would be an opportunity "to hold joint Senate and House hearings on the auditing process at an early date in the next Congress and to move an appropriate legislative remedy." *Id.*

ment for following *Bradley* and applying the intervening statute to the issue on appeal is even more compelling.

The Third Circuit, when considering whether to apply the 25% standard, also took into account its corrective nature as well as the fact that it enhanced the goals of the Title I program—socio-economic legislation with direct impact upon the future educational development of American youth. The Third Circuit found the legislative provision before it to be remedial because of its corrective nature as well as the social nature of the Title I program and concluded that such remedial legislation should be liberally construed to achieve its beneficial designs. *Tcherepnin* v. *Knight,* 389 U.S. 332 (1967). This was certainly an appropriate element in the court's overall consideration of whether to apply the 1978 eligibility standard to the Newark Title I program.

Finally, application of the 25% eligibility standard to the Newark Title I program visited no harm, much less "manifest justice," on the federal government. In *Bradley,* the Court identified three concerns pertinent to the "manifest injustice" exception to the general rule requiring application of the law in effect at the time of decision. These factors are "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Bradley, supra,* 416 U.S. at 717.

With regard to the first factor, this Court distinguished suits involving "great national concerns," and parties who are public entities, from private suits involving individuals. *Bradley, supra,* 416 U.S. at 718-719, citing *United States* v. *Schooner Peggy,* 1 *Cranch* 103 (1801). Where private parties are concerned, the Court warned lower courts to "struggle hard against a construction which will, by a retroactive operation, affect the rights of parties. *Bradley supra,* 416 U.S. at 717, citing *Schooner Peggy, supra,* 1 *Cranch* at 110. The instant matter is a prime example of litigation which involves "great national concerns" namely

the largest federal program of assistance to education and not merely a private suit between individuals. Retroactive application of the corrective 25% eligibility standard is also encouraged by the fact that the parties to this suit are public entities. Indeed, courts have refused to find prejudice or manifest injustice in the application of new legislation to pending matters when the only interests affected by the congressional action are those of the government itself. *See, Hill* v. *United States,* 571 F.2d 1098, 1102 (9th Cir. 1978).

With regard to the "nature of the rights" of the parties and the "nature of the impact of the change in law upon those rights," there is certainly no vested right, in the matter *sub judice,* in the continued application of an administrative regulation which impedes the basic objectives of the Title I program. On the contrary, the only true right involved herein is the public "right" or expectation that Title I moneys will be expended to provide necessary compensatory education programs structured to meet the special needs of poor children living in areas with high concentrations of poverty. To the extent that the retroactive application of the 25% eligibility standard contained in the 1978 Amendments conforms implementation of the program to its original objective, it augments rather than impairs, that public right. The retroactive application of this eligibility standard to the Newark Title I program, therefore, presents no factors which would trigger the "manifest injustice" exception to retroactivity.[20]

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[20] The Secretary argues, for the first time before this Court, that the General Savings Statute, 1 U.S.C. §109, definitely establishes the prospectivity of the 25% eligibility standard. This argument is singularly unpersuasive. The General Saving Statute provides that "[t]he repeal of any *statute* shall not have the effect to release or extinguish any . . . liability *incurred under such statute* . . ." Since New Jersey's purported liability did not incur under any prior statute, but rather under deficient regulatory standards which were subsequently corrected by Congressional action, 1 U.S.C. §109 is inapplicable.

(Footnote continued on following page)

In measuring the eligibility of Newark's attendance areas by the corrective 25% standard, the Third Circuit faithfully adhered to this Court's ruling in *Bradley* v. *School Board of Richmond* since is applied the eligibility

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(Footnote continued from preceding page)

In this regard, it is well settled that "no statute is to be construed as altering the common law further than its words import." *Shaw* v. *Railroad Co.*, 101 U.S. 557 (1880). Courts have recognized this principle with specific reference to 1 U.S.C. §109. As a provision differing from the common law, 1 U.S.C. §109 "must be strictly construed and limited to repealed statutes" and not extended to the revocation of regulations promulgated by an administrator under legislative authority. *Rodgers* v. *United States,* 158 F.2d 835 (6th Cir. 1947), rev'd on other grounds, 332 U.S. 371 (1947); *United States* v. *Hark,* 49 F. Supp. 95 (D.C.D. Mass 1943), rev'd on other grounds, 320 U.S. 531 (1944), rehearing denied, 321 U.S. 802 (1944). The Secretary, nevertheless, contends that for the purpose of the General Savings Statute the term "regulation" may be substituted for "statute" and cites for that proposition *Batterton* v. *Francis,* 432 U.S. 416 (1977). In *Batterton,* however, this Court did not address the application of 1 U.S.C. §109 but simply considered whether regulations adopted by the Secretary of HEW were reasonable and within the statutory authority delegated to that official.

Although in the present case, unlike *Rodgers,* Congress did amend the ESEA to include a 25% eligibility standard, this particular amendatory provision did not represent a change in the direction of the Title I program as set forth in the prior statutory provision. Rather, the legislative objective was to correct regulations promulgated pursuant to the ESEA which actually thwarted the objectives of the Title I program. Thus, the ultimate effect of the subsequent Congressional action was not to repeal a statutory provision but to disapprove an administrative regulation. Indeed, the legislative history reveals continued support for the originally stated purpose of Title I to direct payments under the program to "educationally deprived children in school attendance areas having high concentrations of children from low-income families. . . ." 20 U.S.C. §241e(a)(1). Since the impact of the 25% eligibility standard enacted as part of the 1978 Amendments is on regulations, the General Savings Statute, codified in 1 U.S.C. §109, does not apply.

standard in effect at the time of its decision, since the statutory change concerned the precise issue pending before it on appeal, since there was no statutory direction or legislative history to indicate that the 25% eligibility provision could not be applied to pending audit claims and since the application of the standard to the Newark program resulted in no harm to the federal government but rather served to further the clearly articulated objectives of the Title I program. The Third Circuit thus fairly resolved the dispute before it. Given its imperative to justly resolve disputes presented to it, in equity, it could do no less, since the alternative solution sought by the Secretary—blind adherence to a long since discredited regulatory standard which operates to frustrate the goals of the Title I program—would work a grave injustice to the impoverished children of Newark.[21]

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[21] In his brief to the Court, the Secretary speaks in laudatory tones of the federal government's commitment to Newark, citing the fact that during the audit period (1970-73) Newark received over $28,000,000 in Title I funds—over 18% of the State's allocation (Pet. B 28, n. 17). In reality, sadly, the level of federal assistance, while appreciated, pales by comparison to that of the state and local taxpayes. While Title I moneys available to educationally disadvantaged children in Newark have remained fairly constant, *i.e.* $9,631,019 in 1970-71 $9,899,446 in 1971-72; $9,379,-648 in 1972-73 and $15,316,172 in 1983-84; State aid to Newark has increased dramatically, *i.e.* $21,566,996 in 1970-71; $29,069,240 in 1971-72; $38,517,410 in 1972-73 and $150,902,441 in 1983-84. Twentieth Annual Report of the Commissioner of Education, State of New Jersey; Twenty-First Annual Report of the Commissioner of Education, State of New Jersey; Twenty-Second Annual Report of the Commissioner of Education, State of New Jersey; Thirty-Third Annual Report of the Commissioner of Education, State of New Jersey.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent devotes the major portion of its brief (Br. 21-41) to the proposition that the Title I school attendance area eligibility standards in effect from 1967 through 1976, 45 C.F.R. 116.17(d) (1972), were "out of harmony" (Br. 34-35) with the goals of the Title I program and "of dubious legal validity" (Br. 35). Does respondent, then, urge this Court to declare that those regulations were invalid? It does not and cannot.

As respondent itself points out (Br. 15-17 nn. 12 & 13), if the court of appeals had agreed with its argument that the regulations governing this case were invalid, then respondent would have been absolved of all liability. Under the judgment below, however, respondent concedes it is liable to repay at least $249,607 in misspent funds (*ibid.*). Respondent did not file a cross-petition for a writ of certiorari, and thus is not free in this Court to argue that the 1967-1976 regulations were invalid; such an argument

would provide respondent greater relief than did the decision below. *Strunk* v. *United States*, 412 U.S. 434, 435-437 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972).[1]

For purposes of this case, therefore, the Court must assume that the regulations respondent violated were valid and enforceable. Respondent's criticisms of the regulations are simply irrelevant to the actual issue in the case, which is whether statutory changes in subsequent Title I grants should be held to apply retroactively to grants made and administered under the prior, valid, standards. When respondent finally turns to that issue (Br. 41-49), it offers nothing to cast doubt upon the correctness of the analysis presented in our opening brief.

2. Respondent contends (Br. 47 n.20) that the general savings statute, 1 U.S.C. 109, does not apply to liabilities incurred under subsequently repealed or amended regulations, as opposed to statutes. This contention is unfounded. The plain language of the savings statute indicates that it applies to any liabilities "incurred *under* such statute" (emphasis added); this extends to any liabilities incurred pursuant to the authority of the statute. *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386 (1953). Indeed, this Court has expressly stated:

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[1]Nor do respondent's arguments on this score have any merit. The congressional intention that Title I funds be used in "areas which have the highest proportions of children from low-income families" (S. Rep. 95-856, 95th Cong., 2d Sess. 7 (1978); H.R. Rep. 95-1137, 95th Cong., 2d Sess. 5 (1978)) is obviously served by a rule requiring that school districts confine Title I programs to areas where the concentration levels are at or above the average for the district as a whole. Our opening brief (at 27-32) contains an extended discussion of the point. Whether one agrees with this rule as a matter of policy, it is plainly neither arbitrary nor irrational. See 20 U.S.C. (1976 ed.) 241e(a), 242(b) (explicit delegation of rulemaking authority to grantmaking agency); *Chevron U.S.A., Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-6; *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981).

> The precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, *or of regulations issued under it*, occurring before its expiration.

Allen v. *Grand Central Aircraft Co.*, 347 U.S. 535, 554-555 (1954) (emphasis added).[2]

The Court has not hesitated to apply the general savings clause to preserve liabilities incurred under regulations issued pursuant to statutes that subsequently expired or were repealed. See *United States* v. *Palletz*, 330 U.S. 812 (1947) (summarily reversing, on authority (inter alia) of general savings clause, then Rev. Stat. § 13 (1878 ed.), judgments dismissing prosecutions for violations of regulations issued under Emergency Price Control Act of 1942, after expiration thereof); *United States* v. *Wheelbarger*, 331 U.S. 791 (1947) (same).

Respondent's reliance on *Rodgers* v. *United States*, 158 F.2d 835 (6th Cir.), rev'd in part on other grounds, 332 U.S. 371 (1947), and *United States* v. *Hark*, 49 F. Supp. 95 (D. Mass. 1943), rev'd, 320 U.S. 531 (1944), is rather surprising. In *Hark*, this Court squarely held "that revocation of [a] regulation did not prevent indictment and conviction for violation of its provisions at a time when it remained in force" (320 U.S. at 536). This is because the common law rule barring criminal prosecutions for offenses subsequently repealed does not apply to changes in regulations. "Revocation of the regulation does not repeal the statute; and though the regulation calls the statutory penalties into play,

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[2]Although the Court's statement in *Allen* refers directly to the second sentence of 1 U.S.C. 109 (concerning the expiration of temporary statutes), it applies with equal force to the first sentence of the Section (dealing with repealed statutes). The two sentences are in every other respect identical.

the statute, not the regulation, creates the offense and imposes punishment for its violation" (*ibid.* (footnote omitted)). *Rodgers* is to similar effect. Thus, if the general savings statute does not apply to changes in regulations, it is because a savings clause is unnecessary — not because a contrary result is intended.

It therefore does not matter whether this case is viewed as involving a regulatory change (due to the 1976 regulatory revision) or a statutory change (due to the 1978 Act). In either case, liabilities incurred under the regulations, valid at the time, are not released or extinguished by subsequent developments.

3. Respondent's final contention is that the court of appeals in this case "did what courts of equity historically do" (Br. 20); that, "[g]iven its imperative to justly resolve disputes presented to it, in equity, it could do no less" (Br. 49). However, the role of the courts in judicial review of the Secretary's determinations under the Act is to judge whether the Secretary has acted in compliance with law. Cf. *Fedorenko* v. *United States*, 449 U.S. 490, 516-517 (1981). The role for equity and forgiveness in this scheme is played by Congress and the Secretary, not by the courts. Congress expressly considered whether to forgive liabilities for Title I funds misspent prior to 1978 — including New Jersey's — and rejected the proposal. See 127 Cong. Rec. S5430 (daily ed. May 21, 1981). Upon completion of this litigation, the Secretary will have authority, subject to statutory standards, to return up to 75% of the recovery to the State. See Pet. Br. 48-49. The court of appeals erred in relieving respondent of its obligation to repay funds misspent under regulations in effect at the time, merely because Congress

and the agency subsequently decided to change program requirements in later years.[3]

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1984

[3]We call the Court's attention to an additional authority supporting our position that subsequent changes in federal grant provisions should not be applied to grants made and administered under prior law. *National Wildlife Federation* v. *Marsh*, 747 F.2d 616 (11th Cir. 1984).

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